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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1055

W. T. STONE, WARDEN,

*Petitioner,*

v.

LLOYD CHARLES POWELL,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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W. T. STONE, WARDEN,

*Petitioner,*

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*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Whether an ordinance which makes it a crime to be a person who

> Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification

is unconstitutional because (a) it is vague on its face; (b) it was vague as applied to respondent; (c) it trenches on the right to travel interstate; (d) it violates the presumption of innocence; (e) it creates an unconstitutional presumption in a criminal case; (f) it authorizes arrest and conviction on less than probable cause; and (g) it criminalizes the exercise of the privilege against self-incrimination.

2. Whether evidence seized in a search pursuant to an arrest under the above unconstitutional ordinance may be introduced into evidence.
3. Whether, under the above ordinance, a police officer had probable cause to arrest respondent who was walking with a companion in a shopping center parking lot during daylight business hours, cooperated with the officer when questioned, identified himself and, to the extent asked, gave an account of his presence.
4. Whether this Court should now overrule a line of precedent beginning in 1868 and culminating in a decision only last term, and now remove from habeas corpus jurisdiction (28 U.S.C. §2254) all constitutional claims (including Fourth, Fifth and Fourteenth Amendment violations) which do not go to the issue of innocence or guilt.
5. Whether, in light of the fact that the District Court found that the Henderson, Nevada police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. §2254.



6. Whether, if the Court decides that jurisdiction is no longer appropriate under 28 U.S.C. §2254, the Court should do so in a purely prospective ruling.
7. Whether admission of evidence of respondent's arrest in possession of the murder weapon, along with introduction of the weapon itself, was error harmless beyond a reasonable doubt.

## STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case with the following addition.

On July 15, 1970, ten days after the California Supreme Court denied respondent's petition for a writ of habeas corpus, respondent, representing himself, filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. On September 17, 1970 the court entered an order denying the petition. On July 15, 1971, pursuant to stipulation of all parties and counsel, the appeal from this order was dismissed with leave to file an amended petition in the district court. The amended petition was filed on August 24, 1971. The District Court denied the petition, the United States Court of Appeals for the Ninth Circuit reversed, and this Court granted *certiorari*.

## STATEMENT OF THE FACTS

### A. *The Arrest*

At 10:10 a.m. of the morning of February 18, 1968, respondent, Mr. Lloyd Charles Powell, and his compan-

ion, Mr. Chaney, were walking in the parking lot of a shopping center in Henderson, Nevada. At the same time Officer Lattin of the Henderson Police Force was driving his police cruiser by the parking lot. The shopping center was open and there were people in the parking lot (App. 11). Officer Lattin "observed two unidentified to this officer Negro male adult subjects." (App. 5). He testified that "As the two subjects appeared to look at my police unit, they quickly turned and started walking in an opposite direction." (App. 5). As the officer continued to watch Mr. Powell and Mr. Chaney, "the suspects appeared to continue to look back toward my vehicle from time to time and walk in a very rapid manner." (App. 6).

Officer Lattin made a U-turn and, since the two had parted company and were walking in different directions, he radioed another officer that he intended to stop the two, and that he would stop the one who was walking towards the rear of the department store. (Mr. Powell). (App. 6-7). The other officer apparently stopped and arrested Mr. Chaney (Tr. 171). The record does not disclose the basis, if any, for Mr. Chaney's arrest.

Officer Lattin pulled up behind Mr. Powell and honked his horn. Mr. Powell continued walking, and Officer Lattin alighted from his car and said "Wait a minute." Mr. Powell then stopped and turned around (App. 7).[1]

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[1] Petitioner's Statement of Facts states "The officer followed respondent and directed him to halt. Respondent failed to do so, continuing to walk rapidly toward the rear of a department store. The officer finally stepped from his vehicle and ordered respondent to stop." (Petitioner's Brief, pp. 7-8). This could be misleading, since the officer did not "direct Mr. Powell to halt." He merely honked his horn.



Officer Lattin asked Mr. Powell if he had any identification, and he replied that it had recently been stolen. Mr. Powell, however, gave the officer his true name, Lloyd Charles Powell, and his birth date. Officer Lattin ran a records check on the name and birth date, but with negative results (App. 8). Officer Lattin testified that Mr. Powell's appearance matched the age he had given, and that he had no reason to believe the name was false other than his own "suspicious nature." (App. 14).

Officer Lattin then asked Mr. Powell where he had been staying, and he said that he had been staying with friends in Las Vegas (App. 8) for the past few days (App. 16). Mr. Powell said that he did not know the address (App. 8, 17). Then Officer Lattin "asked him where he was en route to which he stated back to Michigan." (App. 9). Officer Lattin testified that he had no reason to doubt that Mr. Powell was going to Michigan (App. 13), and that one of the routes through Henderson could take one to Michigan (App. 12), but that it was "unreasonable in my opinion" to go to Michigan via Henderson.[2]

Officer Lattin did not ask Mr. Powell if he had any money (App. 13), nor does it appear that he ever asked

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[2] Actually, it is more reasonable to travel from Las Vegas to Michigan via Henderson. A traveler in Las Vegas has two obvious routes to Michigan. He can take Highway 15 north to Highway 80, which is the northern route through Wyoming, or he can drop a short distance south on Highway 95 (passing by Henderson) and catch Highway 66, the southern route. A traveler on February 18 (the date of Mr. Powell's arrest) might well have decided to take the milder, southern route rather than risk the severe weather often encountered on Highway 80. Officer Lattin did not bother to ask Mr. Powell why he was taking the southern route.

him why he and his companion were walking in the shopping center in the manner which aroused the officer's suspicion. The officer did not ask why Mr. Powell was going to Michigan via Henderson, nor did he attempt to corroborate any of what Mr. Powell had told him, including his identity, with Mr. Chaney.[3] Instead, Officer Lattin arrested Mr. Powell for vagrancy.[4] Following the arrest, Mr. Powell was searched, and a pistol with six expended cartridges was found in his coat pocket. (App. 18-19).

Sometime after the arrest and search it was discovered that Mr. Powell was wanted in California. He was returned to California and charged with first degree murder. At the trial the trial judge denied respondent's motion to suppress, and Officer Lattin then related the facts and circumstances of Mr. Powell's arrest to the jury (including his attempt to change his name at the Henderson police station) (App. 30). The gun with six fired chambers was introduced into evidence (App. 7, Tr. 275). The jury convicted Mr. Powell of second degree murder, and he was given a sentence of from five years to life.[5]

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[3]Mr. Chaney's nickname is "Detroit." (Tr. 84, 122).

[4]The Henderson vagrancy ordinance provides "Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." 507 F.2d at 95.

[5]On August 27, 1975 Mr. Powell was released from prison, and now, pursuant to an arrangement with the State of California, he lives under parole custody in Detroit, Michigan.



B. *The Trial*[6]

On the late evening of February 17, 1968, Mr. John Chaney, Mr. Lester Mercer, Mr. Fred Buckley and respondent, Mr. Lloyd Charles Powell, were in a cocktail lounge when they decided to go to a liquor store and purchase some liquor. (Tr. 132). Shortly after midnight the four men entered the Bonanza Liquor Store, 1052 W. 5th Street, San Bernardino, California (Tr. 8).

Mr. Mercer purchased cigarettes and beer, and was attempting to give Mr. Buckley some change to buy some liquor (Tr. 67). At this time Mrs. Parsons, who was clerking behind the counter, suspected Mr. Powell had stolen a bottle of wine, so she leaned over and asked Mr. Powell about the wine under his jacket (Tr. 31, 68). At about the same time Mr. Parsons, who had been watching Mr. Powell from behind a one-way glass in the rear of the store, came up and confronted Mr. Powell and stated "What about that wine?" (Tr. 31). Mr. Powell responded, "What wine? I have no wine," whereupon Mr. Parsons grabbed his jacket stating, "You're going to pay for the wine that you have under your coat or what are you going to do?" Tr. 11, 31, 68). Mr. Parsons claimed that Mr. Powell struck him in the mouth (Tr. 11), causing Mr. Parsons to become "groggy" (Tr. 34-35).

Mr. Powell may have left the store immediately after this scuffle. (Tr. 12, 135, 169-170). At this time Mr. Parsons asked his wife to hand him the gun which was

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[6]The following review of the trial is relevant only because petitioner has challenged the Ninth Circuit Court of Appeals' finding that introduction of Mr. Powell's possession of the murder weapon was not harmless beyond a reasonable doubt.

kept behind the counter (Tr. 12). This was the same gun later found in Mr. Powell's possession in Henderson, Nevada. She handed him the gun, and he pointed it at the door, but did not see Mr. Powell (Tr. 12-13). Mr. Parsons testified that Mr. Powell re-entered the store, and Mr. Parsons pointed the gun at him and cocked it. From this point in the trial, the witnesses differed sharply as to who had the gun when the fatal shot (killing Mrs. Parsons) was fired, in what order the next three shots were fired, whether the fatal shot was fired during a struggle over possession of the gun, and whether Mr. Powell was even in the room at the time of the fatal shot.

As Mr. Powell walked towards Mr. Parsons, Mr. Parsons claimed that he purposefully fired the gun into the ceiling and then dropped it behind the ice cream freezer. Mr. Parsons claimed that Mr. Powell then went past him, retrieved the gun, and shot Mr. Parsons in the wrist (Tr. 16-17). Mr. Buckley, on the other hand, testified that the gun was never dropped (Tr. 71), but rather when Mr. Parsons pointed the gun at Mr. Powell, Mr. Powell grabbed his arm and a struggle ensued during which the gun went off (Tr. 70). Mr. Powell, Mr. Parsons and Mrs. Parsons were "tussling" over the gun (Tr. 70), and Mrs. Parsons was hitting Mr. Powell on the back of the head with a stamp machine (Tr. 104).

Mr. Chaney's testimony essentially agreed with Mr. Buckley's version. He testified that a struggle over the gun ensued, and that Mrs. Parsons, who weighed 380 pounds (Tr. 187), was throwing things at Mr. Powell and hitting him over the head with a stamp dispenser (Tr. 169). He stated "the lady started throwing things. Came from behind the counter, started hitting Mr. Powell over the head and that's when the gun went off. All three was in a scuffle and I ran out of the store." (Tr. 169).



Contrary to petitioner's Statement of The Facts (Petitioner's Brief, p. 7), Mr. Chaney did not testify that Mr. Powell was in possession of the gun as Mr. Chaney left the store. He testified that Mr. Parsons was "the onlyest person I seen with a gun, yes, sir." (Tr. 169).

There is further confusion as to what happened next. Mr. Parsons testified that after he was shot in the wrist, he ran into the back room to get yet another gun, and that while he was out of the room he heard a shot and a scream. As he was returning, he heard the cash register bell ring, and he saw Mr. Buckley, the only person in the store, leaning over the cash register. He shot at Mr. Buckley, and the bullet ricocheted off the cash register and struck Mr. Buckley in the left arm (Tr. 18-19, 79). Mr. Buckley fled from the store. It was then that Mr. Parsons discovered that Mrs. Parsons had been shot.

Mr. Buckley, who was the only witness who testified that he was in the room at the time Mrs. Parsons was shot, gave several different versions of these events, and they all differed from Mr. Parsons' version. First, Mr. Buckley testified that he did not see Mrs. Parsons get shot (Tr. 73).[7]

The prosecutor then attempted to refresh Mr. Buckley's recollection and impeach his testimony with a statement taken from Mr. Buckley by a police officer.

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[7]Q. Did you see her get shot?

A. No, I didn't see her get shot. I heard the discharge but I didn't see her actually get shot.

Q. Who had the gun at that time?

A. At this time I can't rightly say who had the gun.

Q. Why can't you rightly say?

A. Because, like I said, it was a scuffle in the back there and they was wrestling with the gun and I can't rightly say who had the gun. There was three people back there.

The statement was taken at the hospital while Mr. Buckley was intoxicated, suffering from loss of blood from the gunshot wound in his arm (Tr. 109, 110-111), and under arrest for the attempted murder (Tr. 89, 118). In that statement the officer wrote "The first shot went into the ceiling and the second struck Buckley in the left arm. Buckley said that the next thing he knew was that Lloyd had the gun and first of all shot the manager's wife and then the manager." (Tr. 79). Mr. Buckley testified that he could not recall making that statement (Tr. 79), and at the preliminary hearing he had also denied that it was an accurate reflection of what he had said (Tr. 81). It is also different from the order in which Mr. Parsons testified the events occurred.

The prosecution also attempted to impeach Mr. Buckley with his preliminary hearing testimony in which he stated that Mrs. Parsons had "lunged toward" Mr. Powell "and the gun discharged." (Tr. 80). Later in his testimony, Mr. Buckley said that the gun went off during the struggle, and Mrs. Parsons fell after the second shot (Tr. 103-04). According to Mr. Buckley, the last shot struck Mrs. Parsons, after which everybody left the room, *leaving Mr. Buckley alone with Mrs. Parsons during the time Mr. Parsons was getting the second gun* (Tr. 109, 117). *It was at this time that Mr. Parsons testified the fatal shot was fired.* (Tr. 18-19).

The Court adjourned for the Memorial Day holiday, and when court resumed, Mr. Buckley changed his testimony and then testified for the first time that he "believed" he saw the gun in Mr. Powell's hand (Tr. 85-86, 124-25). Mr. Buckley did not explain why he changed his testimony; he merely stated to the prosecutor "Whatever you ask me, I believe I can answer it." (Tr. 85). The record, however, does reflect that Mr. Buckley



had originally been arrested and charged with the murder (Tr. 90, 118, 126), and he knew that he could still be recharged with the murder (Tr. 91-92). There was also strong evidence that he attempted to take money from the cash register (Tr. 18-19, 87-88). Even after he changed his testimony, there were times when he was equivocal about who had possession of the gun (Tr. 105).[8]

With the evidence in this posture, the jury was told that Mr. Powell was found on the same day in Henderson, Nevada in possession of Mr. Parsons' gun. They were also told that Mr. Powell attempted to change his name at the Henderson police station after his vagrancy arrest. Mr. John Davidson, a criminalist, testified that ballistics tests indicated that the fatal bullet was fired from the gun found in Mr. Powell's possession (Tr. 235-40). Since Mr. Powell was found in possession of the fatal weapon, the District Attorney argued that the only issue in the trial was "intent," (Reporter's Partial Transcript 28, 37, 29) (hereinafter R.P.T.), and he proceeded to use the weapon to demonstrate the deliberate effort required to pull its trigger, arguing "that it doesn't fire accidentally and it doesn't hit people accidentally either." The jurors were told to pull the trigger in order to decide for themselves whether or not it was likely that it went off accidentally or whether or not it was fired with the requisite intent to convict. (R.P.T. 37, 38). The District Attorney was even careful to underscore the fact that, while only three or four shots were fired in the store, by the time the gun was taken from Mr. Powell the

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[8] Q. Did you ever actually see it in his hand?

A. This is not very clear. I don't remember. I can't say that I actually seen the gun in his hand at any time.

rest of the shots had been fired. "We find the gun later in the possession of this defendant in Henderson, Nevada. There was an interesting point there. Remember we had six expended shell cartridges in the gun when the gun was recovered. . . . In any event, we don't explain the other two expended cartridges." (R.P.T. 40). The jury was left to supply its own explanation, and the jury convicted Mr. Powell of second degree murder.

## SUMMARY OF ARGUMENT

In February, 1968, respondent was arrested for vagrancy while walking with a companion during daylight business hours in an open shopping center in Henderson, Nevada. The arrest was unconstitutional because, as the Court below held, the vagrancy ordinance under which respondent was arrested was unconstitutionally vague in that it failed to give fair notice of the proscribed conduct. The ordinance also violated the Fourth Amendment right to be free from unreasonable searches and seizures because it authorized full custodial arrests and prosecution based on mere suspicion.

Pursuant to this arrest, respondent was searched and a pistol was found which was later introduced into evidence at his subsequent trial for murder. Since the only justification for the search was an arrest in violation of respondent's Fourth and Fourteenth Amendment rights, we argue that the court below was correct in holding that the evidence should have been suppressed.

Suppression of the evidence is also appropriate because the ordinance, which requires a suspect to have an "apparent reason or business" and requires him to "identify himself and account for his presence," violates the



Fifth Amendment right against self-incrimination, the presumption of innocence, and the right to travel interstate. The ordinance makes it a crime for a suspect to refuse to answer a police officer's questions concerning his identity and his suspicious conduct. Since respondent was arrested because, in the officer's view, he had refused to "identify himself and to account for his presence," his arrest was in violation of the Fifth Amendment. Since the ordinance places the burden on the suspect to persuade the officer of his innocence, it violates the presumption of innocence. Since the ordinance requires a traveler to have a "reason or business" to be on the streets of Henderson, it violates the fundamental right to travel interstate. The direct fruits of a search incident to the arrest must, therefore, be suppressed.

Respondent was arrested because of the manner in which he was walking and because he appeared to be looking at the police car. When stopped, he gave his true name and birth date. He was not asked to account for his presence in the shopping center, but he did tell the officer that he was on his way to Michigan and had been staying with friends in Las Vegas. Everything transpired in broad daylight in a business district, and the arresting officer knew of no recent crimes which could be attributed to respondent. Consequently, we argue that the ordinance is unconstitutional as applied to respondent's conduct because it did not give him fair notice that *this* conduct was proscribed. In the alternative, we argue that the arresting officer did not have probable cause to believe that respondent had violated the ordinance. In either event, the arrest was invalid and the evidence seized in the search pursuant to the arrest should have been suppressed.

The reasons for the suppression rule extend even more clearly to an arrest under an ordinance which violates the Fourth, Fifth and Fourteenth Amendments than they do to an arrest which is unconstitutional only because the individual officer makes a mistake. The existence and enforcement of unconstitutional laws threatens the security of every citizen. The purpose of general deterrence of unconstitutional conduct is served because legislatures will be aware of this Court's decisions and will refrain from passing such laws. The Court's judicial integrity is clearly called into question because if the evidence is admitted, the law is given the Court's imprimatur. Moreover, failure to suppress would undermine this Court's historical duty to uphold the Constitution by judicially reviewing and nullifying unconstitutional legislation. In numerous cases this Court has suppressed evidence seized under the authorization of unconstitutional statutes.

Petitioner's suggested "alternatives" to suppression are insufficient. Declaring the ordinance invalid without suppressing the evidence would violate the case or controversy requirement of Article III. It would also be inappropriate because it would remove all incentive to make suppression motions, in the future, since they would be a waste of time for the arrested citizen. The alternative of bringing a declaratory judgment action is inadequate because standing requirements are very strict and it would make vindication of petitioner's rights depend on whether some other potential vagrant decides at some time to file a declaratory judgment action. Given the class of people who are commonly arrested for vagrancy, that is unlikely. Finally, the alternative of declaring the ordinance unconstitutional in a prosecution for vagrancy is sufficient only if the arrest is taken through prosecution, and the vagrant's lawyer, if any, pursues the matter



vigorously on those grounds. It provides no relief for those wrongfully arrested but not prosecuted. Since one of the primary purposes of laws such as this is to facilitate investigation, the purpose is fulfilled by the arrest, and prosecution seldom follows.

Petitioner argues that federal habeas corpus should not be available to review Fourth Amendment claims of state prisoners. The jurisdictional grant (28 U.S.C. §2254) has existed in its present form since 1867. Ever since *Ex parte McCardle*, 73 U.S. 318, 325-26 (1868), decided one year after its adoption, the section has been interpreted consistently with its plain meaning to include within its ambit all imprisonment in violation of the Constitution, laws and treaties of the United States. Critics of the rule have pressed Congress on numerous occasions to modify habeas corpus jurisdiction, yet Congress has steadfastly refused to do so. Congress, when fully aware of these arguments, reconfirmed the scope of habeas corpus jurisdiction by re-enacting the statute in 1966. For this Court to judicially modify the jurisdictional statute would be to usurp the prerogative of Congress to define the scope of jurisdiction of the lower federal Courts.

Not only has Congress rejected proposed limitations on the scope of federal habeas corpus, but the arguments of those critical of the present rule are not well founded. Since suppression is designed to accomplish both special and general deterrence, the fact that a ruling comes late is of no importance. Fourth Amendment claims are particularly appropriate for federal review because, since they do not go to the question of guilt or innocence, they are less likely to be given sympathetic treatment by state courts. Any "friction" which may exist between state and federal courts is a product of the Fourth Amendment and not the existence of federal habeas corpus. In addition

Congress has struck the appropriate balance between state and federal courts by requiring exhaustion of remedies and by giving state factual proceedings a limited res judicata effect. The number of habeas corpus filings is a misleading gauge of the time federal courts must spend to resolve them. The vast majority do not result in hearings and are easily disposed of. Since this Court alone handles approximately 4,000 petitions a year, the distribution of between 9,000 and 11,000 filings throughout the federal system is not unduly burdensome. The burden on this Court could, however, be intolerable since prisoners would have no choice but to proceed directly to this Court. Moreover, since it is not known how many of the petitions involve only Fourth Amendment issues, the impact of eliminating Fourth Amendment issues is purely speculative. In fact, under petitioner's proposed rule, each of these petitions would still have to be examined in order to determine whether the petitioner had had a fair opportunity to raise the issue in the state court.

Even if "mine run" Fourth Amendment claims were to be eliminated from federal habeas corpus, the present case is particularly appropriate for federal review because it involves the constitutionality of a state statute which is a virtual primer of constitutional violations. Both Congress and this Court have recognized the special appropriateness of federal review of state decisions upholding the constitutionality of state statutes. Since the statute is still on the books in Nevada (and also California), a decision striking it down at this time would be as timely as if the arrest had occurred yesterday.

If this Court decides to eliminate all Fourth Amendment claims from the scope of federal habeas corpus, we urge the Court to do so in a purely prospective opinion. Respondent did not appeal or apply for *certiorari* to this



Court because the availability of federal habeas corpus was clear under this Court's opinions. Since the time has passed to apply for direct review to this Court, it would be unconscionable to deprive respondent of all access to federal court by changing the rule in his case. This Court rendered a purely prospective ruling in a similar situation. *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411(1964).

Finally, we argue that introduction of respondent's possession of the murder weapon, the weapon itself, and respondent's attempt to change his name after his arrest was not harmless error in a trial where the jury not only had to decide the question of guilt, but the degree of the crime.

## ARGUMENT

### I

### BY REQUIRING A SUSPICIOUS PERSON TO IDENTIFY HIMSELF AND TO ACCOUNT FOR HIS PRESENCE, THE HENDERSON ORDINANCE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT NOT TO INCRIMINATE ONESELF.

One of the elements of the crime of vagrancy in Henderson is the refusal of the suspect to "identify himself and account for his presence." (See fn. 4, *supra*) Assuming for the purpose of argument that this clause is sufficiently definite to meet constitutional standards of fair notice (See Part III, *infra*) the ordinance makes the exercise of one's constitutional right not to incriminate oneself an element of the crime for which the suspected

vagrant is arrested.[9] Needless to say, it cannot be made a crime to invoke the Fifth Amendment.

One of the underlying reasons for the Fifth Amendment right to remain silent in the face of governmental interrogation, which is applicable to the states through the Fourteenth Amendment (*Malloy v. Hogan*, 378 U.S. 1 (1964)), is the protection of the citizen from "the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1963); See *Michigan v. Tucker*, 417 U.S. 433, 445 (1974). In case after case, beginning with *Boyd v. United States*, 116 U.S. 616 (1886), this Court has assiduously protected the right against self-incrimination by giving the Fifth Amendment a liberal interpretation and by forbidding the attachment of penalties to its invocation. See *e.g.*, *Brooks v. Tennessee*, 406 U.S. 605 (1972) (may not require defendant to testify as first defense witness); *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1967) ("[T]he police have the right to request citizens to answer voluntarily questions concerning unsolved crimes [but] they have no right to compel them to answer."); *Spevak v. Klien*, 385 U.S. 511 (1967) (may not discipline attorney for invocation of privilege in disciplinary proceedings); *Terry v. Ohio*, 392 U.S. 1, 34 (1967) (may not compel suspect to answer police questions or base probable cause on failure to answer) (concurring opinion of White, J.); *Griffin v. California*, 380 U.S. 609 (1965)

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[9] Although the self-incrimination issue was briefed and argued in the District Court and the Court of Appeals for the Ninth Circuit, the latter did not decide the issue since the ordinance was found to be unconstitutionally vague and in violation of the Fourth Amendment.



(may not comment on failure of defendant to take the stand); *Malloy v. Hogan*, 378 U.S. 1 (1964) (contempt); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1963) (contempt).

The Court has not confined the right to the literal language of the amendment, and has expanded it to include police questioning. *Michigan v. Tucker*, 417 U.S. 433 (1974); *Davis v. Mississippi, supra*, 394 U.S. at 727 n.6; *Miranda v. Arizona*, 384 U.S. 436 (1966). Even in the context of regulatory schemes whose purpose is ostensibly non-criminal, the privilege has been held to apply if the people from whom information is sought are a "highly selective group inherently suspect of criminal activities." *Albertson v. SACB*, 382 U.S. (1965) (required registration of communist party members); *Leary v. United States*, 395 U.S. 6 (1969) (marijuana tax); *Grosso v. United States*, 390 U.S. 62 (1968) (gambling tax); *Marchetti v. United States*, 390 U.S. 39 (1968) (gambling tax); *Haynes v. United States*, 390 U.S. 85 (1968) (firearm registration). Even a statute requiring no more than identification in a non-criminal context was barely upheld as constitutional by this Court in a plurality opinion with four dissenters. *California v. Byers*, 402 U.S. 424 (1971) (hit and run statute). But *cf. Davis v. Mississippi, supra*, (illegally seized fingerprint evidence suppressed).

Against this backdrop, the continued existence of a law which not only does not allow the suspect to invoke the privilege "in the unfettered exercise of his own free will" (*Malloy v. Hogan, supra*, 378 U.S. at 8), but actually makes it a crime to refuse to answer the officer's interrogation, is an anachronism. The ordinance, by requiring a suspect both to identify himself, and to account for his presence, goes much further than the

hit-and-run statute upheld in *Byers, supra*. The ordinance does not even employ the pretext of being part of a non-criminal regulatory scheme such as the hit-and-run statute in *Byers*, the ostensible purpose of which was enforcement at civil liabilities arising from auto accidents.[10] In addition, those singled out for interrogation

[10]When faced with a constitutional challenge to California's disorderly conduct law, a statute worded identically to the Henderson ordinance, the California Court of Appeals acknowledged that a statute requiring more than identification would violate the right against self-incrimination. *People v. Solomon*, 33 Cal. App.3d 429, 108 Cal. Rptr. 867 (1973). The court, therefore, gave the statute a narrow construction restricting its requirements to identification only.

The California court, basing its decision on *California v. Byers, supra*, held that it does not violate the Fifth Amendment to require a criminal suspect to identify himself. There is no support for this conclusion in *Byers* because the *Byers* case dealt only with a statute designed for a non-criminal purpose. The *Solomon* court, however, recognized that the disorderly conduct statute was designed for a criminal purpose—the prevention and detection of crime. Moreover, the position that identification is non-testimonial, and that, therefore, compelled identification cannot violate the Fifth Amendment, was endorsed by only four members of this Court in *Byers. Cf., Davis v. Mississippi, supra*, in which fingerprint evidence was suppressed because seized in violation of the Fourth Amendment.

The *Solomon* decision is of little relevance to the present case because there is no Nevada decision giving the Henderson ordinance a narrow construction. It is also clear that Officer Lattin believed that the ordinance required more than mere identification because he testified that he arrested respondent for violation of the ordinance "due to the fact that the subject had no *real* answer as far as where he had been staying nor the friends that he was with *nor could give me a reason for being in the Henderson area*.... (App. 9) (Emphasis added)



are members of a "highly selective group inherently suspect of criminal activities." In fact, before acting under the ordinance, the officer must first believe that the public safety demands the inquiry. The clear purpose of this ordinance is to assist officers in detecting crime by requiring suspects to respond to an officer's interrogation. One can hardly imagine a law more directly violative of the Fifth Amendment than an ordinance subjecting a suspect to arrest, search and conviction for invoking it.

## II

## THE ORDINANCE VIOLATES DUE PROCESS OF LAW BECAUSE IT CREATES AN UNSUPPORTABLE PRESUMPTION OF GUILT AND IT SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT, THUS ALLOWING CONVICTION ON LESS THAN PROOF BEYOND A REASONABLE DOUBT.

The ordinance also violates due process of law because the requirement that the suspect account for his presence in effect shifts the burden to the suspect to either persuade the officer that his suspicions are unfounded or be convicted of a crime for failure to do so. As such, it creates an invalid presumption that loiterers and wanderers have committed crimes. Such a presumption is invalid unless this Court can at least say with fair assurance that the underlying fact (wandering or loitering) makes it more likely than not that the presumed fact (apparently that criminality is afoot) is true. Manifestly, there is no basis on which such an assumption can be made. "The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the

bud—is too extravagant to deserve extended treatment." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972); *See Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *Johnson v. Wright*, 509 F.2d 828 (5th Cir. 1975); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 Stan. L. Rev. 341 (1970).

In addition, the ordinance shifts the burden of proof to the suspect, requiring him to establish his innocence without first requiring the prosecution to at least show a prima facie case of guilt. The ordinance therefore violates the constitutionally required rule that the prosecution must establish guilt beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970). *See Lego v. Twomey*, 404 U.S. 553 (1972); *Johnson v. Wright, supra.*; Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim. L. Bull. 205, 228-29 (1967)), and it substitutes an inquisitorial system for the constitutionally required accusatorial system invisioned by the Fourth, Fifth and Fourteenth Amendments.



## III

## THE HENDERSON ORDINANCE VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS BECAUSE IT DOES NOT GIVE FAIR NOTICE OF THE CONDUCT CONSIDERED CRIMINAL AND BECAUSE IT AUTHORIZES FULL CUSTODIAL ARRESTS AND SEARCHES FOR CONDUCT JUSTIFYING NO MORE THAN A BRIEF DETENTION.

The Henderson ordinance reads:

> Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

*The ordinance is unconstitutionally vague on its face and as applied*

A conjunction of three elements is necessary for one to be guilty of vagrancy under the ordinance. It is required that the suspect be a person who (1) "loiters or wanders upon the streets or from place to place without apparent reason or business," (2) "refuses to identify himself *and* to account for his presence," when (3) "surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Each one of these three elements, which have never been construed narrowly or otherwise by the Nevada courts, is unconstitutionally vague.

This Court has already ruled that a clause virtually indistinguishable from the first element of the Henderson

ordinance is unconstitutionally vague on its face. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the offending language of the ordinance read in part

> [P]ersons wandering or strolling around from place to place without any lawful purpose or object . . . shall be deemed[11] vagrants . . . . 405 U.S. at 156-57 n.1

This Court struck down the ordinance because it was

> void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, *United States v. Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88; *Herndon v. Lowry*, 301 U.S. 242.

The Court went on to say that the law provides no guidelines by which enforcement authorities may distinguish between innocent and unlawful conduct, and, by allowing arrest and conviction on suspicion, it invited arbitrary and erratic application by placing almost unfettered discretion in the hands of the police. The law cast its net so broadly that it included within its ambit innocent activities which are part of the amenities of life as we have come to know it in the United States. *Papachristou, supra*, 405 U.S. at 164.

The few differences between the Jacksonville and the Henderson ordinance exacerbate the vagueness of the latter. While the Jacksonville ordinance criminalized "wandering . . . without any lawful purpose," the Henderson ordinance permits the arrest of one who "wan-

[11] *See also Smith v. Florida*, 405 U.S. 172 (1972).



ders . . . without apparent reason or business . . . ." Thus, while the Jacksonville ordinance at least attempted to limit its scope to people with other than lawful purposes, the Henderson ordinance criminalizes simple strolling with no purpose in mind. This kind of simple strolling is one of the amenities of life which may not be made criminal. *Papachristou, supra*, 405 U.S. at 164-65. In addition, not only must one have a "reason or business" in order to walk in Henderson, but that reason or business must be "apparent." One consulting this ordinance and attempting to hue his conduct to its mandate would be at a complete loss as to how he is to make his "reason or business," assuming he must have one, "apparent."

By requiring one to have an apparent reason or business in order to be in Henderson, this ordinance also trenches on the fundamental right to travel interstate. *Shapiro v. Thompson*, 394 U.S. 618, 629-33; *Edwards v. California*, 314 U.S. 160, 178-81 (1941); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *United States v. Guest*, 383 U.S. 745, 757 (1966). Officer Lattin admitted that he placed respondent under arrest because he did not recognize him (App. 5, 11), and he "could not give me a reason for being in the Henderson area . . . ." (App. 9). Interstate travelers need not deviate from the most direct route at the peril of being arrested by local police because the city council does not want strangers in its town without apparent reason or business. Amsterdam, *supra*, 3 Crim. L. Bul. at 213. When a law trenches on a fundamental right, the law must be drawn with sufficient precision so that citizens may pursue a lawful course of conduct without fear of being caught within the net of the overly broad, vaguely drawn law. Note, *The Void-*

*For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 104 (1960); Amsterdam, *supra*, 3 Crim. L. Bul. at 213-14. While this rule has been often applied in First Amendment cases (*Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974)), there is no reason to believe that the right to travel interstate is entitled to any less protection than the right to free speech.

> [E]ven though the governmental purpose by legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose. *Aptheker v. Secretary of State*, 378, 500, 508 (1964).

One year prior to *Papachristou*, this Court unanimously held that the phrase "without visible or lawful business," was unconstitutional *as applied* to someone discharging a woman (whose name he claimed not to know) from his automobile late at night, under somewhat suspicious circumstances. *Palmer v. City of Euclid*, 402 U.S. 544 (1971). Two Justices would have held the phrase unconstitutional on its face. If the Euclid ordinance was unconstitutionally applied under the suspicious circumstances of the *Palmer* case, then the phrase "without apparent reason or business" (a more vague injunction than the Euclid ordinance) is unconstitutional if applied to a citizen walking with a companion in a shopping center during daylight business hours. Certainly, Mr. Powell's reason or business in the shopping center was as "apparent" as Mr. Palmer's nighttime business was "visible." See *Palmer, supra*, at 546.

The second element of the Henderson ordinance (that of refusing to identify himself and to account for his



presence), in addition to being in flagrant violation of the right against self-incrimination (See Part I, *supra*), suffers from the same infirmities of vagueness. When Mr. Powell was asked for his name and birth date, he gave them truthfully. If the ordinance is to be construed to require that a citizen do more in order to "identify himself," "it is quite unreasonable . . . to charge [respondent] with notice that such would be the construction of the ordinance. 'The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' " *Palmer, supra*, 402 U.S. at 545.

In addition to requiring that the citizen identify himself, the ordinance is written in the conjunctive and requires that the suspect go further and "account for his presence." This latter phrase would be a nullity if any account, no matter how bizarre or unreasonable, were to satisfy the requirements of the statute. It must be that something more is required–either a "good" account, or a "satisfactory" account, or an account "satisfactory to the officer." The ordinance is silent as to what kind of account is required, therefore it is even more vague than similar "good" or "satisfactory" account statutes that have been invalidated in other cases. See *Ricks v. District of Columbia*, 414 F.2d 1097, 1104-05 (D.C. Cir. 1968); *Baker v. Binder*, 274 F. Supp. 658, 664 (W.D. Ky. 1967); *United States v. Margeson*, 259 F. Supp. 256, 268-69 (E.D. Pa. 1966).

Officer Lattin testified that he arrested Mr. Powell "due to the fact that the subject had no *real* answer as far as where he had been staying *nor the friends that he was with nor could give me a reason for being in the Henderson area* . . . ." (App. 9) (Emphasis added). It is clear, therefore, that Officer Lattin interpreted the ordi-

nance as demanding an account which was satisfactory to him. Thus, the vagueness of the ordinance invites arbitrary application and entrusts law making "to the moment-to-moment judgment of the policeman on his beat." *Smith, supra*, 415 U.S. at 578. In *Papachristou*, this Court quoted with approval from President Roosevelt's message vetoing a proposed District of Columbia "account" statute and his reasoning that

> [W]hile this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense . . . . It would hardly be a satisfactory answer to say that the sound judgment and decisions of the prosecuting officers must be trusted to invoke the law only in proper cases. 405 U.S. at 166-67 n. 10.

The Henderson ordinance could hardly be a better example of a law illustrating these defects.

The "account" provision of the ordinance is also vague as applied to respondent. After inquiring as to respondent's identify, Officer Lattin asked respondent where he was staying and where he was going. (R.T. 8-9). Respondent replied that he had been staying with friends in Las Vegas (he did not know their address), and that he was going to Michigan (App. 8, 9). The officer testified that he had no reason to disbelieve that respondent was going to Michigan (App. 13), that one could in fact go to Michigan through Henderson (App. 12), but that in his opinion it was "unreasonable" to go to Michigan that way. (App. 18). This ordinance can hardly be said to put one on notice that an account of one's presence in Henderson would require the names and addresses of people with whom one had been staying for the past few days in another city. Likewise, the ordinance gives no



warning that being bound for another state by other than a route a police officer considers "reasonable" would not be a sufficient account of one's presence. See *Palmer, supra*, 402 U.S. at 546.

The final element of the offense under the Henderson ordinance ("surrounding circumstances . . . indicate to a reasonable man that the public safety demand such identification") provides even less guidance to the citizen than the first two elements. The ordinance does not provide that the citizen must know what circumstances give rise to the officer's suspicion, nor does it provide that the officer is to inform the citizen. In the present case, Officer Lattin never asked respondent to explain his conduct in the shopping center, nor did he tell respondent what had given rise to his suspicions. He had no idea, therefore, what respondent's explanation would have been. Thus, under the terms of the ordinance and on the facts of this case respondent was arrested for a crime an element of which was both beyond his knowledge and beyond his control. Not only does this clause fail adequately to inform the citizen what is proscribed, it fails to inform him at all.

Petitioner's reliance on *Terry v. Ohio*, 392 U.S. 1 (1968) (Petitioner's Brief, p. 52) is misplaced. While an officer may be justified in a brief detention in order to make a limited inquiry under circumstances described by the ordinance, nothing in *Terry* would suggest that the *Terry* standard of reasonable suspicion may be made an element of an offense justifying arrest and booking. Indeed, the Court was held to the contrary:

> We allow our police to make arrests only on "probable cause," a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on

> suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality.
>
> . . .
>
> A direction by a legislature to the police to arrest all "suspicious" persons would not pass constitutional muster. *Papachristou, supra*, 405 U.S. at 169. (Footnotes omitted)

Likewise, this Court held in *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) that

> Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." (Footnotes omitted)

It is submitted that the Court should add "vagrancy" to its list of terms used to justify unreasonable detention.

While a vague standard might be tolerated as a justification for a limited stop and inquiry, it would be intolerable to use the same standard as an element of a crime justifying full arrest, search and prosecution. It is hard to imagine a more open invitation to discriminatory enforcement, because "whether or not a suspect is hauled off to jail for suspicious loitering depends, for all intents and purposes, upon the whim of the policeman." *People v. Berck*, 3 N.E.2d 411, 414, 32 N.Y.2d 567, *cert. denied*, 414 U.S. 1093 (1973) (clause reading "circumstances which justify suspicion that a person may be engaged or about to engage in crime" held unconstitutionally vague and violative of the Fourth Amendment); *United States ex rel. Newsome v. Malcolm*, 429 F.2d 1166, 1173 (1974) *aff'd sub nom. Lefkowitz v. Newsome*,__U.S.__ (1975).



> Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest. *Henry v. United States*, 361 U.S. 98, 104 (1959).

Petitioner argues that even if the statute is vague, respondent was given sufficient warning by the ordinance to know that his conduct was proscribed. (Petitioner's Brief, 51-53). Fundamental to this argument is the assumption that respondent has done something which, under a more specific and narrowly drawn ordinance, could be proscribed.[12] But it cannot be made a crime to arouse the suspicions of a police officer (*Papachristou, supra*, 405 U.S. at 169); it cannot be made a crime to refuse to incriminate oneself (See Part I, *supra*); and it cannot be made a crime to be in a Henderson shopping center on one's way to Michigan. *Shapiro v. Thompson, supra*. Thus, an ordinance which perfectly described respondent's conduct in the shopping center would still not justify his arrest.

It is also essential to this argument that the ordinance have some hard core of meaning which respondent may fairly be said to have transgressed. *Parker v. Levy, supra*, 417 U.S. at 746.[13] It is submitted that the Henderson

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[12] See *Smith v. Goguen, supra*, 415 U.S. at 577-78; *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974).

[13] Petitioner's reliance on *Parker v. Levy* is misplaced. Lieutenant Levy was prosecuted for "conduct unbecoming an officer and a gentleman" (Uniform Code of Military Justice, Art. 133) because of his anti-war activity while in the service. The Court held that the differences between military and civilian society justified the application of the *more permissive standards of vagueness that apply to criminal statutes regulating economic affairs*. The Uniform

ordinance, like the law struck down in *Smith v. Goguen*, *supra*, is so palpably vague with respect to each of its elements that it has no hard core of meaning.

Finally, even if it can be said that the statute might be clear enough to reach some conduct, it did not clearly reach respondent's conduct. Based on Officer Lattin's brief observation of respondent, it cannot be said that he was loitering or wandering. Whatever "apparent reason or business" may mean, it is clear that everything respondent did in broad daylight was "apparent." Although when the officer honked his horn, respondent continued walking, when requested to stop, he did so. At the request of the officer he identified himself and gave his birth date. He did not produce a driver's license or other identification because he did not have any. He did not "account" for his manner of walking with his companion in the shopping center because Officer Lattin never asked him to do so. He was merely asked where he was going, and he replied that he was going back to Michigan. There is nothing in the ordinance which would indicate that a person subjects himself to arrest for looking at a police officer who is also looking at him while making a U-turn. Nor can it be said that inability to relate with whom one had been staying in a different city for the past several days is clearly a failure to account for one's presence in

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Code of Military Justice also requires that the Code be explained to each enlisted man during his first six months of service. The Code also contained a number of illustrative examples of proscribed conduct in its appendix. Moreover, the Court noted that the special nature of military life was such that members of the military would be imbued with an awareness of uniquely military crimes.

By contrast, petitioner was merely a civilian walking in the parking lot of an open shopping center.



Henderson. While it could be argued that this ordinance fairly reaches a midnight prowler in a high crime neighborhood who refuses to answer the questions of the police, this is clearly not such a case.

## IV

## RESPONDENT'S FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS ARRESTED UNDER THE UNCONSTITUTIONAL ORDINANCE.

Petitioner asks this Court to hold that a city council may pass an unconstitutional ordinance which violates the Fourth, Fifth, and Fourteenth Amendments, and then allow the prosecuting authorities to use any evidence seized in searches pursuant to arrests for the unconstitutional crime. Petitioner's first argument in support of this novel rule is that there is no violation of the Fourth Amendment because the officer acted in good faith reliance on the ordinance, and the ordinance does not violate the Fourth Amendment because "*no* statute can violate the amendment."[14] (Petitioner's Brief, p. 14).

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[14] There are numerous cases to the contrary. *United States v. Brignoni-Ponce*, 43 U.S.L.W. 5028; *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of New Hampshire*, 403 U.S. 443 (1976); *Berger v. New York*, 388 U.S. 41 (1967); *Stanford v. Texas*, 379 U.S. 476 (1965); *Boyd v. United States*, 116 U.S. 616 (1886); *See Sibron v. New York*, 392 U.S. 40 (1969). In each of these cases the Court invalidated a legislatively authorized search which violated the Fourth Amendment. In *Camara* and *See* convictions for refusal to

Petitioner's argument is not only contrary to a venerable line of this Court's precedent, but it amounts to a caricature of bureaucratic buck-passing. Petitioner attempts to fragment the government in such a way that arrests and searches may be unconstitutionally conducted, yet no branch of the government will be responsible. Thus, under petitioner's view, the courts are not responsible because they do not make the arrest and are only passive recipients of the fruits of the search; the police are not responsible because they are told to do it by the legislature; and the legislature is not responsible because it only tells the police to do it, but does not actually do it itself. This incredibly casual view of the right to privacy protected by the Fourth Amendment is supported neither by the language and policy of the amendment[15] nor by any prior decision of this Court in which the issue has been presented.

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allow the search were set aside. In *Brignoni-Ponce, Almeida-Sanchez, Coolidge, Sibron* and *Berger* the evidence was suppressed. In *Stanford* and *Boyd* (Fourth and Fifth Amendment) the evidence was ordered returned.

Interestingly, in petitioner's brief in support of the petition for the writ of *certiorari*, petitioner distinguished respondent's cases on the grounds that the statutes relied upon by the officers "dealt directly with the standard and procedures governing searches and did not attempt to define a substantive crime. In short, each involved legislative encroachment upon Fourth Amendment rights." (Petition for Writ of Certiorari, pp. 17-18). Petitioner has now abandoned this position in favor of the novel argument that there is no such thing as a legislative encroachment upon Fourth Amendment rights.

[15] "The concept of evidence—the conceptual setting of any constitutional guarantee pertaining to evidence—compels attention to the whole transaction, to use as well as acquisition. Or in other words, fragmentation of the transaction is as arbitrary as fragmentation of the government. The Fourth Amendment fragments



One need look no further than the Fourth Amendment itself to see that petitioner reads the Constitution too narrowly. The amendment provides

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .

The amendment obviously was intended to serve the broad purpose of protecting citizens from "*unreasonable governmental intrusions* into the privacy of one's person, house, papers, and effects," *United States v. Calandra*, 414 U.S. 338, 353 (1974) (Emphasis added); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The amendment clearly does not stand for the proposition that the people are to be secure only from unreasonable arrests and searches conceived by the police, but the city council may direct arrests, searches and seizures at will.

> [T]he Fourth Amendment was intended to secure the citizens in person and property against unlawful invasion of the sanctity of his home by the officers acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it . . . . *Weeks v. United States*, 232 U.S. 383, 294 (1914); *Adams v. New York*, 192 U.S. 585, 598 (1903).

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neither the transaction nor the government. Its meaning is that when any part of the government participates in an evidentiary transaction which involves an unreasonable search and seizure it commits a constitutional wrong. And for any part of the government to commit a wrong denominated as such by the Fourth Amendment is not just a wrong in the abstract, but to violate a person's constitutional right." Schrock and Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 302 (1975).

In short it is inconceivable that the drafters of the Fourth Amendment could on the one hand condemn unreasonable police conduct, and at the same time approve of legislation directing the police to make unreasonable arrests. "The struggle against arbitrary power in which they [the framers of the Constitution] had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." *Boyd v. United States*, 116 U.S. 616, 630 (1886); *See Stanford v. Texas*, 379 U.S. 476, 481-85 (1965). The fact that petitioner can cite numerous cases which speak in terms of deterring the police (*See* Petitioner's Brief, p. 15-16) merely reflects the happenstance that in the vast majority of cases it is at the enforcement level rather than at the legislative level that the decision to engage in unconstitutional conduct is made.[16]

In addition to the plain meaning of the Fourth Amendment, this Court has consistently held in a line of cases beginning as early as 1886 that legislatively authorized searches and seizures can violate the Fourth Amendment. In *Boyd v. United States, supra*, a federal law requiring a defendant in a penalty or forfeiture proceeding to produce his books and papers was held to violate the Fourth and Fifth Amendments. In *Berger v. New York*, 388 U.S. 41 (1967), this Court struck down New York's wire tap statute and suppressed evidence seized in good faith compliance with the statute. In the same year this Court voided prosecutions for refusal to permit warrantless inspections for housing code violations. *Camara v. Municipal Court, supra; See v. City of Seattle*, 387 U.S. 541 (1967). In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), this Court held that even though probable cause may have existed to support issuance of a warrant, evidence seized pursuant to a warrant issued by the Attorney General under authority of a state statute must be suppressed. The Fourth Amendment was violated in spite of the statutory authorization for the search and the reliance by the searching officers on a written search warrant. *See also Stanford v. Texas*, 379 U.S. 476, 481 (1965) (even assuming warrant authorized by state statute and issued on probable cause, evidence ordered returned). Again, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), this Court suppressed evidence discovered by immigration officers even though the search was made in strict compliance with Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. §1357(a), and the regulations promulgated thereunder (8 C.F.R. §287.1). This Court stated that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Id.* at 272.[17] This holding was reaffirmed only last term in *United States v. Brignoni-Ponce*, 43 U.S.L.W. 5028.

[16] Even the existence of laws such as the Henderson ordinance can violate the Fourth Amendment. Although a citizen has never been stopped, searched or arrested under a vagrancy law, clearly it is impossible to be "secure" from unreasonable searches and seizures so long as these laws are on the books and present a real threat of enforcement. *See Alderman v. United States*, 394, U.S. 165, 203 (1969) (Fortas, J., dissenting). If this is not so, then respondent certainly cannot bring the declaratory judgment action petitioner suggests respondent could have filed in order to assure himself that he could walk the streets of Henderson unharassed. (Petitioner's Brief, pp. 36-37).

[17] *See also Sibron v. New York*, 392 U.S. 40, 59 (1968) ("the question . . . is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. . . .").

Although it did not involve application of the suppression rule, *Papachristou* is squarely on point. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), involved a vagrancy ordinance with elements similar to the Henderson Ordinance. In striking down the ordinance, this Court said:

> We allow our police to make arrests only on "probable cause," a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, if foreign to our system, even when the arrest is for past criminality.
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> . . . .
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> A direction by a legislature to the police to arrest all "suspicious" persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest. *Papachristou, supra*, 405 U.S. at 169.[18]

It is this error with respect to the scope of the Fourth Amendment which also leads petitioner to the erroneous conclusion that good faith belief that the ordinance has been violated is all that the Fourth Amendment requires. The amendment forbids unreasonable searches and seizures, so it is clear that a policeman's good faith in making an arrest does not satisfy the Fourth Amendment. *Beck v. Ohio*, 279 U.S. 89, 97 (1964); *Henry v. United States*, 361 U.S. 98, 102 (1959). In *Whitely v.*

[18] *People v. Berck*, 300 N.E.2d 411, 414-415, 32 N.Y.2d 567, *cert. denied*, 414 U.S. 1093 (1973); *United States ex. rel. Newsome v. Malcolm*, 492 F.2d 1166, 1173 (2d Cir. 1974), *aff'd on other grounds sub nom., Lefkowitz v. Newsome*, 417 U.S. 967 (1974).



*Warden*, 410 U.S. 560 (1971), this Court rejected the argument that an arrest was valid because the arresting officer, relying in good faith on a police bulletin indicating the defendants were wanted, made an arrest. The good faith and probable cause of the arresting officer could not be used as a shield against inquiry into the underlying constitutionality of the arrest. *See also, Coolidge v. New Hampshire, supra*, 403 U.S. at 450 (Search violates Fourth Amendment in spite of existence of search warrant).

This same error leads petitioner to conclude that if probable cause existed under the ordinance, then it follows that the Fourth Amendment has not been violated. (Petitioner's Brief, pp. 14-21). Obviously, an arrest, and the search pursuant thereto, may be unreasonable even though authorized by a statute if the statute authorizes unreasonable arrests. *Papachristou, supra*, 405 U.S. at 169. This conclusion is so obvious that it was assumed in *Brignoni-Ponce, supra, Almeida-Sanchez, supra, Whitely, supra, Coolidge, supra, Berger, supra, Sibron, supra, Stanford, supra* and *Beck, supra*. Indeed, *Almeida-Sanchez* and *Brignoni-Ponce* are paradigmatic examples of officers acting in complete good faith under a statute and yet, because the statute authorized unreasonable searches and seizures, the Fourth Amendment was violated.

The "probable cause" requirement is merely a shorthand way of describing what the Fourth Amendment requires of an arresting officer, *assuming that the law under which he acts is constitutional*. Since most criminal laws are not constitutionally suspect, satisfaction of the probable cause requirement is usually all that is necessary to satisfy the Fourth Amendment. The Ninth Circuit,

however, found that the Henderson ordinance was unconstitutional precisely because it is a legislative encroachment upon the Fourth Amendment. The Court said:

> It should be emphasized that the ordinance is also incompatible with incorporated Fourth Amendment principles. A vagrancy ordinance of this kind "conflict[s] with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause." *United States ex rel. Newsome v. Malcolm, supra,* 492 F.2d at 1172. *See also Papachristou, supra,* 405 U.S. at 169-70; *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1972) (*en banc*), *noted in* 47 N.Y.U.L. Rev. 595 (1972) and 18 Vill. L. Rev. 117 (1972).
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> As these authorities reflect, such a vagrancy ordinance subverts the "probable cause" requirement in two ways. It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense. Police are duty-bound to investigate suspicious conduct, and founded suspicion will support an investigative stop and inquiry. *Wade v. United States*, 457 F.2d 335, 336 (9th Cir. 1972). But more is required to justify arrest. *Henry v. United States*, 361 U.S. 98, 101, 104 (1959).
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> The "probable cause" requirement is negated by such vagrancy ordinances in a second way. Their language is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by which an officer may determine whether the ordinance has or has not been violated. Because



> a man of reasonable caution cannot form a reasonable belief as to whether such an ordinance has been violated, an officer cannot "gauge justification for [vagrancy] arrests consistently with Fourth Amendment principles." *Hall v. United States, supra,* 459 F.2d at 837. 507 F.2d at 96-97 [Footnote omitted].

## V

## EVIDENCE SEIZED PURSUANT TO AN ILLEGAL ARREST AUTHORIZED BY A STATUTE WHICH VIOLATES THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS MUST BE SUPPRESSED.

### A. Suppression is the most appropriate remedy for a statutory violation of the Fourth Amendment.

The continued vitality of the suppression rule in both state and federal prosecutions can hardly be doubted.[19] *United States v. Brignoni-Ponce, supra; United States v. Almeida-Sanchez, supra; Brown v. Illinois, supra.* The appropriateness of applying the suppression rule even though the official conduct was authorized by statute is also clear. The principal is both as venerable as *Boyd, supra* (decided in 1886) and as current as *Brignoni-Ponce, supra* (decided in 1975).

Petitioner, however, argues that since the Henderson ordinance does not merely authorize searches, but rather

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[19] The exclusionary rule has at times been criticized and its efficacy questioned. *Brown v. Illinois*, 45 L. Ed.2d 416, 425 n. 5 (1975).

defines an unconstitutional crime for which a citizen may be arrested, searched *and jailed*, application of the suppression rule is inappropriate. (Petitioner's Brief, pp. 24-39). Far from discouraging unreasonable searches and seizures, petitioner's argument would positively encourage repressive legislation in violation in the Fourth Amendment.

For example, it is clear that evidence seized pursuant to a statute authorizing the search of all Mexican appearing individuals within 100 miles of the border would be suppressed. *Almeida-Sanchez, supra.* However, under petitioner's view, if Congress simply had gone further and made it a crime to be a Mexican appearing individual (whether or not within 100 miles of the border) then any evidence seized in a search pursuant to an arrest for this unconstitutional crime could be used with impunity. This anomalous result is contrary to the reasons for the Fourth Amendment, the exclusionary rule, and the role of this Court as the ultimate arbiter of the constitutionality of state and federal legislation.

Although deterrence and judicial integrity are most often cited as the reasons for the suppression rule, something more fundamental may be offered in its defense. The "exclusionary rule" is simply the consequence of the rule of law and the appropriate relationship of the federal courts to the other branches of our government, including the states. The principle is as well established as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall stated:

> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established theory; and would seem, at first view, an absurdity too gross to be insisted on. *Id.* at 177.



This specific function of the exclusionary rule as judicial review was recognized by this Court in *Terry v. Ohio, supra*, when the Court said "[I]n our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry, supra*, 392 U.S. at 13. So, too, failure to suppress the evidence seized pursuant to an arrest under the vagrancy ordinance has the necessary effect of legitimizing the unconstitutional law.

It has long been the rule that the courts give the constitution force and effect by not giving force and effect to governmental conduct that violates the constitution. *Marbury v. Madison, supra*; T. Schrock and R. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 325 (1974); Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. Rev. 1129, 1155-59 (1973). This has particularly been true when the unconstitutional conduct is legislative, as it is in the present case. It has not been thought necessary in other contexts to justify depriving the government of the fruits of unconstitutional legislation on the grounds that nullifying the conduct will "deter" the legislature or government officials from acting unconstitutionally in the future. For example:

> When the Supreme Court strikes down an act for violating the First Amendment is it not punishing congressmen for violating their duty to uphold the Constitution but is simply declaring the statute invalid—thereby itself upholding the Constitution. Schrock and Welsh, *supra* at 356.

Over the years courts have fallen into the pattern of thinking that upholding the Fourth Amendment in contrast to upholding any other amendment in the Bill of Rights, is justified if and only if it punishes and deters those who would violate its commands.

> One factor which may account for these different reactions is that Wigmore and others have repeatedly called exclusion punishment. Another and more influential factor is that the Fourth Amendment duty the police are under has always been more visible than the First Amendment duty imposed on legislators, because imprisonment of the policeman has always been conceivable, whereas no one has suggested jailing congressmen. Perhaps the punishability of Fourth Amendment violations affects our view of exclusion and makes us think of it merely as an alternative to, say, incarceration. But no amount of explaining why we are led to think of exclusion as punishment will make it punishment if it is not. And if it is not punishment or some other deterrent sanction, it is judicial review. That is the dominant and sufficient constitutional fact. If it is also a fact that exclusion deters, then whatever deterrence there is, as Justice Brennan says, is "only a hoped-for effect of the exclusionary rule, not its ultimate objective." *Id.* at 356-57 (Footnotes omitted).

Petitioner has not met the burden of showing exactly why the Fourth Amendment should be treated as a constitutional "stepchild"[20] unentitled to the same

[20] A. Amsterdam, *Perspectives on the Fourth Amendment*, 59 Minn. L. Rev. 349, 363 (1974).



dignity of judicial recognition as any other clause in the Constitution.

Aside from the above, several other reasons for the exclusionary rule have been advanced, and each indicates that suppression is appropriate in this case. Justice Holmes viewed the suppression doctrine as simply a necessary corollary to the rule forbidding acquisition of evidence in a certain manner.

> [t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

The Fourth, Fifth and Fourteenth Amendments forbid the acquisition of evidence in the manner used in this case. Forbidding acquisition in this manner would be practically pointless unless use of the evidence in court is forbidden.

In addition, prohibiting the use of unconstitutionally seized evidence in a court of law has long been thought to be compelled by judicial integrity and the need, over the long run, to preserve popular trust in government. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968); *Elkins v. United States*, 364 U.S. 206, 222-23 (1960). The continuing vitality of the concern for judicial integrity was recently reconfirmed in *Brown v. Illinois*,—U.S.—, 456 L. Ed.2d 416, 425 (1975).[21]

[21] The preservation of the integrity of the Court, and the Court's role in the judicial review of unconstitutional governmental conduct under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) are closely related.

> [W]hen the Court taints its integrity by creating such a remedy, as it does by employing the deterrence rationale to

This reason for the exclusionary rule takes on even greater force when the unconstitutional intrusion is legislative rather than the isolated transgression of a police officer. One might be inclined to forgive a "constable's blunder" made under circumstances requiring quick and uncounseled judgment. A police officer's transgression, even if willful, may be the product of unique facts, and it may never be repeated. Usually, it is a matter of low profile and little public awareness. An unconstitutional statute or ordinance, on the other hand, is more highly visible to the public at large, and the very existence of such statutes has an impact on the security and well-being of the public reaching far beyond the individual case. The body of criminal law is an official declaration to every citizen, which he is presumed to know, that if he does not hue his conduct to the legislatively prescribed standard, he can be arrested, fined and incarcerated. It is impossible to measure the impact on the quality of life laws like the Henderson ordinance have had on citizens who merely wished to enjoy the amenities of life in this country. *Papachristou, supra*, 405 U.S. at 164. Nor is it possible to say how many thousands of innocent citizens

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limit the scope of (or, potentially, abolish completely) the exclusionary rule, an irreconcilable conflict is simultaneously created with the concept of judicial review. Note, 20 U.C.L.A. L. Rev., supra at 1159.

The duty of this Court to uphold the Constitution, recognized in *Marbury*, derives both from the Constitution's status as the "*supreme* law of the land" (5 U.S. (1 Cranch) 137, 180 (1803) (emphasis in original)), and from the oath each justice of the United States must take. The oath reads:

> I . . . do solemnly swear . . . that I will . . . discharge and perform all duties incumbent upon me . . . *agreeably to the Constitution and laws of the United States* . . . 28 U.S.C. §453 (1970).

*See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1903).



have been harassed under the command of this and similar laws. *Almeida-Sanchez, supra*, at 273 n. 5. A well counseled legislative encroachment on constitutional freedoms should not be given the imprimatur of the judiciary by allowing the unfettered use of the fruits of such an invasion. A legislative invasion of the Fourth, Fifth and Fourteenth Amendments, far from being merely "technical,"[22] is reprehensible.[23]

The rule which petitioner urges on the Court would render this Court impotent to put a stop to this kind of official harassment. Moreover, petitioner would deny the Court even the right to refuse to allow itself to be used as the forum in which the purpose (use as evidence) of the illegal conduct is finally accomplished. This situation would erode respect for the power and integrity of the Court, and for the rule of law.

The final reason for the exclusionary rule, deterrence, is the reason given most stress in recent opinions of this Court. See *e.g., Brown v. Illinois, supra; United States v.*

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[22] *Brown v. Illinois, supra*, 45 L. Ed.2d at 432 (concurring opinion of Justice Powell).

[23] "Fourth Amendment violations become more, not less, reprehensible when they are the product of government policy rather than an individual policeman's errors of judgment. See *Alderman v. United States*, 394 U.S. 165, 203 (1969) (Fortas, J. dissenting).

. . . .

Obviously, any rule intended to prevent Fourth Amendment violations must operate not only upon individual law enforcement officers but also upon those who set policy for them and approve their actions. Otherwise, for example, evidence derived from any search under a warrant could be admissible, because the searching policeman, having had a warrant approved by the designated judicial officer, had every reason to believe the warrant valid." *United States v. Peltier*, ____U.S. ___, 45 L. Ed.2d at 393 n. 18 (dissenting opinion of Justices Brennan and Marshall).

*Calandra, supra*. Petitioner argues that deterrence is the only current rationale for the exclusionary rule (Petitioner's Brief, pp. 26, 31-25). From the above discussion, it is clear that this is a false premise. See *Brown v. Illinois, supra*. Petitioner then argues that only deterrence of unconstitutional police conduct is the object of the rule (an unjustifiedly narrow reading of the Fourth Amendment).[24] Finally, petitioner adds the minor premises that either the deterrent purpose is not served by suppression, or the alternative of declaring the statute unconstitutional in a prosecution for vagrancy or a declaratory judgment action is so superior to suppression that the court should ignore the illegal manner in which the evidence was secured in favor of waiting until such future time as a vagrant may file a declaratory judgment action or be prosecuted under the Henderson ordinance. Reasoning from these faulty premises, not surprisingly petitioner arrives at the erroneous conclusion that suppression is inappropriate. (Petitioner's Brief, pp. 35-37).

Nothing in logic or reason suggests that while the Henderson police should be discouraged from illegal arrests, the Henderson City Council should be permitted to order arrests without regard to the Fourth Amendment. Indeed, *Brignoni-Ponce, supra*, and *Almeida-Sanchez, supra*, could hardly be more squarely on point. See also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Sibron v. New York*, 293 U.S. 40 (1968); *Berger v. New York*, 388 U.S. 41 (1967); *Stanford v. Texas*, 379 U.S. 476 (1965). As the Ninth Circuit correctly observed,

[24] See the discussion of the scope of the Fourth Amendment, Part IV, *supra*.



"the public interest is served by deterring legislators from enacting such statutes." 507 F.2d at 98; 47 N.Y.U.L. Rev. 595, 602 604 (1972).[25] Surely, if the United States Congress could not authorize unconstitutional searches in order to assist in the almost impossible task of policing our border (*Brignoni-Ponce, supra; Almeida-Sanchez, supra*) the Henderson City Council may not give its police a roving commission to arrest and jail people whom they believe are "suspicious."

The deterrence rationale underlying the exclusionary rule is even more appropriate when the constitutional violation is legislative than it is when the violation is the isolated conduct of an individual officer. Not only is the infringement on the Fourth Amendment more reprehensible, but one of the reasons given for adoption of the exclusionary rule is the lack of any other realistic remedy, such as damages against the officer. *Mapp v. Ohio, supra*, 367 U.S. at 651-53, 670.

> We have been compelled to reach that conclusion [that suppression is appropriate] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the

[25] Although the deterrence rationale applies well to state legislators and Congress, it is even more appropriately applied to local governmental units such as the Henderson City Council. A city council is more directly responsible to a small electorate, so its decisions are more likely to reflect local, parochial interests. A local campaign to "un-handcuff the police" and to "clean up the streets" could easily manifest itself in unconstitutional, repressive legislation unless the decisions of this Court make it clear that such a course of conduct would be futile. See Note, 47 N.Y.U.L. Rev. 595, 602 (1972).

> courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers .... Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 911-12 (1955); quoted with approval in *Elkins v. United States*, 364 U.S. 206, 220 (1960).

When the constitutional violation is legislative, not only would the practical problems of a damage remedy be as insurmountable, but there is neither a right to sue the officer (*Pierson v. Ray*, 386 U.S. 547 (1967)), nor a right to sue the legislators. *Barr v. Matteo*, 360 U.S. 564 (1959); *Tenney v. Brandhove*, 341 U.S. 367 (1951); See *Monroe v. Pape*, 365 U.S. 167 (1961).

Even if a tort remedy were available, it would not be an adequate remedy to vindicate Fourth Amendment rights. Unsympathetic juries, difficulties in securing counsel, fear of retribution, and the practical problems of pursuing the claim from prison make the remedy only theoretical. Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 Amer. Crim. L. Rev. 507, 530-53 (1975); Spiotti, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Studies 243, 269-70 (1973); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 499 (1955). This Court, however, need not decide what substitutes, if any, may be constitutionally adequate in lieu of suppression. Since none are forthcoming, suppressing is clearly the most appropriate remedy in this case.



Petitioner states "we contend exclusion could not have any deterrent impact on the governing body of Henderson, Nevada; Respondent was tried and convicted in California for violation of a California law; the reversal of his conviction and possible release would be of no concern to Nevada legislators." (Respondent's Brief, p. 37). It is difficult to comprehend exactly what the thrust of this argument is.

If petitioner means that Nevada legislators will not read Supreme Court opinions, the argument may be dismissed out of hand. If it is meant that one state may violate the Fourth Amendment and turn the evidence over to another state for prosecution, it should fare no better than the "silver platter" doctrine did even prior to *Mapp v. Ohio*. See *Elkins v. United States*, 364 U.S. 206 (1959). If petitioner means that Nevada is not concerned with the presence of California criminals within its borders, then petitioner is simply mistaken. The states are not little Balkan nations offering safe haven to one another's rogues. There is no reason to believe that a San Diego robber is any more welcome in Henderson than he would be in Los Angeles. Crime prevention and protection is a joint venture among all of our governments, state and federal. This joint venture starts with the basic extradition provisions of the Constitution and continues through the national, computerized information retrieval systems into which states feed and from which states may retrieve information within minutes. For example, in one recent case the Las Vegas police stopped a hitchhiker and checked his name through the National Crime Information Center (NCIC). See 28 U.S.C. §534 (1968). They received information that he was wanted on a California warrant for parole violation. The parole violation warrant had been sent to the NCIC by the Monterey, California

police; however, they had failed to notify the NCIC that the warrant had been satisfied five months prior to the present defendant's stop. Based on this erroneous information, the Las Vegas police arrested and searched the hitchhiker. The search turned up a shotgun which was the basis for a federal prosecution. The evidence was suppressed. *United States v. Mackey*, 387 F. Supp. 1121 (D. Nev. 1975).

Moreover, petitioner's argument evidences a misunderstanding of the kind of deterrence the suppression rule is designed to accomplish. When the Court holds a search unconstitutional it is not addressing itself exclusively to the officer or legislature that caused the search. The ruling is addressed to all law enforcement agencies and all governing bodies. The deterrent effect should be general, not special, and the ruling is expected to be given appropriate weight by all governments. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709-10 (1970). There is hardly a better vehicle for achieving this kind of deterrence than suppressing evidence seized pursuant to unconstitutional legislation. If this Court suppresses the evidence seized under the Henderson ordinance, then it is unlikely that any legislative body—local, state or federal—is again going to adopt a vagrancy ordinance like the Henderson one only to see arrests and searches under it invalidated and the evidence suppressed.

This finally leaves for consideration petitioner's argument that the possibility (never realized to date) that the law may be declared unconstitutional in a prosecution for vagrancy is a sufficient deterrent to make suppression inappropriate. This suggestion ignores the nature and purpose of vagrancy laws, and its adoption would make it possible for outrageously oppressive laws to remain on



the books for years to be used as an excuse for illegal arrests and searches (at the same time immunizing the police from civil suit, see *Pierson, supra*). Furthermore, if such a rule were adopted, it is unlikely that the law would ever be declared unconstitutional.

Vagrancy laws are used primarily as procedural devices which allow the police to circumvent traditional constitutional safeguards. Conviction is seldom the object of a vagrancy arrest, therefore it is seldom sought. While at one time it was thought that idle people and undesirables should be jailed (See *Edwards v. California, supra*, 314 U.S. 160, 177 (1941)), the law today is, like the law in *Almeida-Sanchez, supra*, primarily an investigatory tool used to remove people from the streets who may be "up to no good" and to search and investigate for evidence of crime.[26] Indeed, petitioner concedes as much. (Petitioner's Brief, p. 23). Since the purpose of the law is satisfied by the stop, search, and occasional night or weekend in jail, in many cases the police will merely stop, search and release the individual. In cases of actual booking, prosecutors will not prosecute. Since the police enjoy immunity from civil suit as long as the statute is not authoritatively declared unconstitutional, it would be a foolish prose-

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[26] Not only is it clear that this is the police practice under the vagrancy laws, See n. 12 and accompanying text, *infra*, but the legislative history indicates that this practice reflects the legislative purpose. For example, the legislative history of the California Disorderly Conduct Statute (Cal. Penal Code §647(e)), which is identical to the Henderson ordinance, reflects just such a legislative purpose. Lafave, Arrest 355 n. 50. This is true of other similar statutes in other jurisdictions. *Id.* at 259 n. 67. Indeed, common sense would indicate that suspicious persons who do not give persuasive accounts for their conduct are not being arrested and punished simply for that circumstance. The obvious purpose of the law is to enable the officer to arrest in order to investigate.

cutor indeed who would jeopardize the continued utility of a vagrancy law by prosecuting for vagrancy and risking a declaration of unconstitutionality.[27]

Since the primary purpose of these laws is to facilitate arrests rather than to punish vagrancy, the pattern of truncating the proceedings short of conviction has already established itself in many jurisdictions. For example, in *People v. Williams*, 55 Misc.2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967) the court said

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, . . . then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them. 286 N.Y.S.2d at 577.

Professor Lafave discovered similar patterns in his research on arrest. Lafave, Arrest (1965). If the questioning and search incident to the arrest for vagrancy did not produce sufficient evidence of a substantive crime to

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[27] A meaningful constitutional challenge to a prosecution under a vagrancy law is made even less likely because the crime of vagrancy seldom would merit the constitutional right to counsel. It is likely that the impecunious class of persons who bear the brunt of these laws would use any money they may have access to for bail, rather than to hire a lawyer. Lafave, Arrest 340.



justify arrest, but the officer thought that further investigation was appropriate, the citizen would be booked for vagrancy and jailed. If the night or weekend in jail provided sufficient time to complete the investigation, the citizen would be either charged with the substantive crime, or, in the event nothing was discovered, the vagrancy charges would be dropped and he would be released. *Id.* at 151, 339, 354-60, 371-72. This practice has been amply documented by other courts and commentators.[28] Indeed, it has been stated:

> [I]t is sufficiently notorious to be a fitting subject of judicial notice that arrests for vagrancy are often made simply as a pretext for a search (or interrogation) which it is hoped will turn up evidence of a crime which the police "merely suspect" the defendant has committed, is committing or will commit and for which the police therefore cannot constitutionally arrest. *Worthy v. United States*, 409 F.2d 1105, 1111 (D.C. Cir. 1968) (dissenting opinion).

Thus, viewed in the context in which vagrancy laws operate, as a practical matter vagrancy laws do not define

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[28] See *e.g.*, *Hall v. United States*, 459 F.2d 831, 836 (D.C. Cir. 1972 (en banc)), Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim. L. Bul. 205, 226-27 (1967); *Report of the President's Commission on Crime in the District of Columbia*, 570 (1966); Douglas, *Vagrancy and Arrest On Suspicion*, 70 Yale L.J. 1, 9-10, 12-13 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 628-30 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L. Rev. 1203, 1218-19, 1225 (1953); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 129-30 (1962); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950); Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. Chi. L. Rev. 345, 368-69 (1936).

crimes of any substance. They are laws enabling police to engage in unconstitutional arrests and searches. The only practical difference between the law struck down in *Almeida-Sanchez, supra*, and the Henderson ordinance is that the suspected vagrant may not only be unconstitutionally searched, but he may also suffer the additional indignity of being unconstitutionally arrested and jailed. A decision by this Court denying a citizen the right to suppress evidence seized pursuant to such an arrest would virtually guarantee that this practice will continue indefinitely.

Petitioner's suggestion that the availability of a declaratory judgment action is a sufficient deterrent to the adoption of these laws is equally as unrealistic.[29] The

[29] At one point petitioner suggests that before applying the exclusionary rule "this Court—or any court—must balance its costs against its benefits." (Petitioner's Brief, p. 26-27). Respondent respectfully suggests that the cost of allowing some guilty people to go free was balanced against the benefit of protecting citizens from unreasonable arrest when the Fourth Amendment was adopted. "It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." *Henry v. United States*, 361 U.S. 98, 104 (1959). In this respect, the Fourth Amendment is no different than other great procedural safeguards such as the presumption of innocence and the right against self-incrimination. Both the right against self-incrimination and the presumption of innocence assume that as a consequence of the rule, in numerous instances the guilty will go free. The Fourth Amendment, in this regard, is no different. Indeed, had Officer Lattin and the Henderson City Council acted consistently with the Constitution, Mr. Powell would not have been arrested and searched. Suppression of the evidence hardly injures the public interest in conviction any more than the Fourth Amendment itself would have frustrated this interest had it been observed in the first instance. If the Fourth Amendment has struck



simple fact is that the availability of the remedy is substantially circumscribed by the requirement of an actual controversy mandated by the Declaratory Judgment Act (28 U.S.C. §2281) and by Art. III of the Constitution (*Ellis v. Dyson*, ___U.S.___, 44 L.Ed.2d 274 (1975)).[30]

One could hardly expect a citizen who wants to travel to send his lawyers before him to file declaratory judgment actions in the cities in which he may wish to walk. It will be a rare case, indeed, in which a citizen with the appropriate standing, assets, and quixotic idealism files a declaratory judgment action to have a vagrancy law declared unconstitutional. See *Anderson v. Nemetz*, 474 F.2d 814, 817, 821 (9th Cir. 1973) (civil rights action holding a "roams about from place to place without any lawful business" statute so clearly unconstitutional that is

the wrong balance, then it may be amended through the appropriate constitutional process.

In addition, it is an overstatement to argue that suppression results in the release of guilty defendants. To be sure, when the only evidence in the case has been illegally seized, then release follows suppression. However, in more serious cases, such as this one, there is often other evidence sufficient to go to trial. Likewise there are often lesser included offenses for which the defendant may be convicted. Kaplan, *The Limits of The Exclusionary Rule*, 26 Stan. L. Rev. v. 1027, 1036 (1974). In fact, in this case petitioner argues that introduction of the illegally seized evidence was harmless beyond a reasonable doubt. (Petitioner's Brief, pp. 54-55). At a retrial, respondent might be convicted again, although a new conviction might well be for involuntary or voluntary manslaughter.

[30] Nevada's Declaratory Judgment Act (Nev. Rev. Stat. 30.040 (1973)) is likewise restricted since it "shall be so interpreted and construed . . . to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees." Nev. Rev. Stat. 30.160.

"no longer a litigable issue . . . .") The impecunious and parapetic class of people who bear the brunt of vagrancy laws (*Papachristou, supra*; Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 4, 13 (1960)), and the unavailability of a damage remedy, further decreases the efficacy of this remedy. Moreover, a similar remedy would have been as available in *Brignoni-Ponce, supra*, and *Almeida-Sanchez, supra*, yet this Court still ordered the evidence seized in those cases suppressed. Thus, the hypothetical possibility that someone in the future may judicially attack this law in some other proceeding is the functional equivalent of no remedy at all. It is certainly no remedy for the countless numbers of people who will be arrested and searched in the meantime.

Interrelated with petitioner's suggestion that the availability of a declaratory judgment action is a sufficient alternative to suppression, is petitioner's argument that this Court should hold that the Henderson ordinance is unconstitutional, and yet not suppress the evidence. (Petitioner's Brief, pp. 37-39). In effect, petitioner seeks to change respondent's habeas corpus action into an action for a mere declaratory judgment. In addition to violating both the Declaratory Judgment Act and Article III of the Constitution, this course of action would be inconsistent with a long line of this Court's precedent.

In order for the Court to declare this ordinance unconstitutional, there must be a case or controversy concerning the constitutionality of the ordinance within the meaning of Article III of the Constitution. The Court recently had occasion to explain the scope of this requirement in the context of a declaratory judgment action seeking to void a loitering ordinance. *Ellis v. Dyson, supra*. In *Ellis* plaintiffs had been arrested and prosecuted under the Dallas, Texas vagrancy ordinance.



They did not appeal their conviction, which became final, but they did seek a declaratory judgment that the ordinance was unconstitutional on grounds similar to those urged in the present case. The Court held that "a genuine threat [of prosecution] must be demonstrated if a case or controversy, within the meaning of Article III of the Constitution and of the Declaratory Judgment Act, may be said to exist . . . . Further, the credible threat must be shown to be alive at each stage of the litigation." *Id.* at 283 (Citations omitted). The Court observed that at oral argument counsel admitted not being in touch with their clients and not knowing their whereabouts. Then the Court stated that "if petitioners no longer frequent Dallas, it is most unlikely that a sufficiently genuine threat of prosecution for possible future violations of the Dallas ordinance could be established." *Id.* at 282.

The *Ellis* case not only underlines the illusory nature of the declaratory judgment action as a substitute for suppression, but it demonstrates the impropriety of declaring the Henderson ordinance unconstitutional without suppressing the evidence. From the time respondent was returned from Nevada to California for trial until the present, Henderson has expressed no desire to prosecute petitioner for vagrancy. On August 27, 1975 respondent was released from prison and now resides under parole supervision in Detroit, Michigan. There is virtually no chance of his ever being again subjected to the possibility of prosecution under the Henderson ordinance. Thus, unless the evidence is to be suppressed, respondent is indistinguishable from the plaintiffs in *Ellis*, and this Court is without power, under Article III, to declare the ordinance unconstitutional. It is the existence of the suppression doctrine that assures that this case will be presented in the concrete, adversary proceeding envisioned by the case

or controversy requirement. Consequently, petitioner's "alternative" to suppression is not only inadequate, it is non-existent. Until a better alternative is devised, even critics of the exclusionary rule concede that suppression is appropriate. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting).

Petitioner's suggestion that the ordinance should be declared unconstitutional, but that the evidence should not be suppressed, is also contrary to the prior practice of this Court, supported by good policy, to give the fruits of his victory to the litigant who successfully challenges the constitutionality of a law authorizing searches and seizures. See *e.g., Berger v. New York, supra; Almeida-Sanchez, supra; Brignoni-Ponce, supra*. This has been so even though the Court's decision has not been applied retroactively. *Peltier, supra*. This practice is supported by sound policy, because nothing would stop the judicial development of constitutional law in general, and Fourth Amendment law in particular, more assuredly than changing a suppression hearing into a mere academic exercise. "Lawyers are meant to serve their clients, and they cannot at the same time serve the growth of the law if they know that time spent and emphasis expended on novel or potentially disruptive points of law are unlikely to advance their client's interests." *Gaither v. U.S.*, 413 F.2d 1061, 1085 (D.C. Cir. 1969). See also, *Hall v. United States*, 459 F.2d 831 (D.C. Cir. 1972). As Professor Oaks, no friend of the exclusionary rule, has observed

> "It is . . .imperative to have a *practical procedure* by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will

attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some Fourth Amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970). [Emphasis added]. See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 429-30 (1974).

**B. Evidence seized in violation of the Fifth Amendment right against self-incrimination must be suppressed.**

While it is clear that respondent was arrested in violation of the Fourth Amendment, and that suppression is appropriate for that reason alone, it is also true that petitioner's arrest was in violation of the Fifth and Fourteenth Amendments. It has long been true that evidence obtained in violation of the right against self-incrimination must be suppressed even though the evidence is reliable. *Lego v. Twomey*, 404 U.S. 553 (1972); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Jackson v. Denno*, 378 U.S. 368 (1964); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Bram v. United States*, 168 U.S. 532 (1897). Even though the violation was made in "good faith," was authorized by the state law, and did not result in coerced testimony, the state must be deprived of the fruits of the violation.

In *Griffin v. California*, 380 U.S. 609 (1965), the California constitution authorized the prosecution to comment on a defendant's failure to take the stand, yet this Court reversed Griffin's conviction because the right



of the prosecution to comment violated the Fifth Amendment. Putting the defendant to the choice of either testifying or suffering adverse prosecutorial comment was an undue burden on the privilege because it made its assertion "costly." *Id.* at 614. For similar reason, this Court reversed a conviction when the state law required the defendant either to testify as the first defense witness or forego the opportunity to testify in his defense. *Brooks v. Tennessee*, 406 U.S. 605 (1972). Even though *Brooks* never testified, "the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right." *Id.* at 611 n. 6.

In a like manner the Henderson ordinance imposed severe penalties for respondent's silence–arrest, search, incarceration and prosecution. Respondent was arrested because, in the officer's opinion, he had refused to answer the officer's questions. Thus, the arrest and search of respondent was a penalty exacted for respondent's assertion of the privilege, and the search, therefore, violated that privilege. *Brooks, supra*. It follows that the direct fruit of that search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *see Michigan v. Tucker*, 417 U.S. 433, 447, 451 (1974); *Orozco v. Texas*, 394 U.S. 324 (1969).

**C. Evidence seized pursuant to an arrest under an unconstitutionally vague law must be suppressed.**

Respondent's Fourteenth Amendment due process rights were also violated because he was arrested under an unconstitutionally vague law. The Henderson ordinance is

vague because it does not set up non-discretionary standards for enforcement, and because it fails to give the citizen adequate notice of what is considered criminal conduct. See Part III, *supra*; Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972-73 Term*, 7 Conn. L. Rev. 94 (1974). Although the values protected by the Fourth and Fifth Amendments and the Fourteenth Amendment vagueness doctrine are not congruent, there is a substantial overlap. Suppression, therefore, is an appropriate remedy for a search pursuant to an arrest under a vague law.

People have a right to be free from unreasonable governmental intrusion with respect to their persons, houses, papers and effects (the Fourth Amendment) and the private enclaves of their minds (the Fifth Amendment). A vague criminal law trenches on the right to privacy exemplified by these two amendments in several ways. The failure to set up non-discretionary standards for enforcement directly violates the Fourth Amendment because it authorizes and encourages unreasonable arrests. (See Part III, *supra*). However, the Fourth and Fifth Amendments also evidence the broader policy that people have a right to be left alone in the lawful pursuit of their lives.[31] *Katz v. United States*, 389 U.S. 347 (1967). Criminal laws which fail to give adequate notice of the proscribed conduct frustrate this right to be left alone because no matter how conscientiously a citizen tries to hue his conduct to the proper standard, he will be frustrated because the standard is unclear. This frustration would be more than academic because the citizen would find his privacy repeatedly invaded by arrests for conduct he did not know was criminal. A code of criminal law which is kept a secret from the people would be anathema to our system of justice. A law which does not give fair notice of what is proscribed is little better.

[31] The policy of the Fifth Amendment is so strong that it applies even in the *unlawful* pursuit of one's life.



Since the values transgressed by a vague criminal law are closely akin to those protected by the Fourth and Fifth Amendments, the same remedy for a violation is appropriate. If the object of a vague law were conviction, this Court would have no hesitancy to set aside the conviction. *Smith v. Goguen*, 415 U.S. 566 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Palmer v. City of Euclid*, 402 U.S. 544 (1971). So, too, when the object of the law is arrest for the purpose of search and investigation, the appropriate remedy is to prevent the government from attaining its objective by suppressing the evidence.

It would make no more sense to declare the ordinance unconstitutional and yet permit use of the evidence seized, than it would to declare the ordinance unconstitutional and yet refuse to set aside a conviction under it. Legislators owe a duty to those who live under their laws adequately to inform them, and if depriving the government of the fruits of arrests under vague laws will deter the passage of such laws, then suppression is appropriate. Likewise, both the integrity of the Court and the Court's role in the judicial review of the constitutionality of legislation make it appropriate for this Court to deprive the government of the fruits of such legislation. Moreover, the case and controversy requirement of Article III would make it inappropriate for this Court to review the

constitutionality of the Henderson ordinance without also suppressing the evidence. (See Part VA, *supra*).

Simply put, the Henderson ordinance, and others like it,[32] constitute a frontal assault on the Fourth, Fifth and Fourteenth Amendments. While this law is merely the ordinance of a small town, it is being reviewed at a time when the public has genuine reason to fear that its government has acted with less than total respect for these fundamental rights. Unless these rights are to become no more than wishful thinking, this Court must make it clear that nothing is to be gained by violating them. There is simply no reasonable alternative to suppression of the evidence.[33]

## VI

## THE ARRESTING OFFICER DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT RESPONDENT HAD VIOLATED THE HENDERSON VAGRANCY ORDINANCE

The absence of probable cause to arrest respondent was briefed and argued both in the District Court and in

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[32] Nev. Rev. Stat. 30.040 (1973); Cal. Pen. Code §647(e).

[33] It is not possible, as it was in *Michigan v. Tucker*, 417 U.S. 433 (1974), to give respondent substantial relief by suppressing the direct fruits of the illegal arrest, and yet deny the motion to suppress with respect to more remote fruits. While this Court may well decide not to apply this case retroactively, that decision should await a subsequent case in which it is properly presented. *Michigan v. Tucker, supra*, at 452 n. 26.



the Ninth Circuit Court of Appeals. Since the Court of Appeals found the ordinance unconstitutional on its face, the Court did not reach the issue of the existence of probable cause. If this Court were to find that the ordinance is constitutional, or that suppression is not appropriate when an arrest is made under an unconstitutional ordinance, then the issue of the existence of probable cause must be addressed.[34]

At the outset it should be noted that this case involves an arrest and the search pursuant to the arrest. The search of respondent may be sustained only on the grounds that probable cause existed to believe that he had violated the Henderson vagrancy ordinance. Although this is not a "stop-and-frisk" case,[35] *Terry v. Ohio*, 392 U.S. 1 (1968) is instructive on the constitutional standard for full, custodial arrests.

There is a substantial difference in the degree of belief which an officer must entertain in order to make a limited *Terry* stop, and the degree necessary to justify a full custodial arrest. *Terry, supra*, 392 U.S. at 26-27. In both instances, it is essential that the police officer be "able to point to specific and articulable facts which,

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[34] The absence of probable cause is also the narrowest ground on which to suppress this evidence. In the absence of probable cause, the constitutionality of the ordinance would not have to be addressed. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

[35] Even if, under the reasonable suspicion standard of *Terry*, Officer Lattin had sufficient cause to stop respondent, the officer never expressed, nor do the facts suggest, a reasonable suspicion that respondent was armed. Consequently, no pat down or "frisk" would have been appropriate under *Terry*. Petitioner does not now contend, nor has petitioner contended, that this seizure could be justified as a protective search for weapons. See 507 F.2d at n.3.

taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry, supra*, at 21. The officer's judgment must be measured against an objective standard because "anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches . . . ." *Terry, supra*, 392 U.S. at 22.

When the officer decides to arrest rather than merely to stop, he may do so only when "he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime." *Terry, supra*, 392 U.S. at 26; *Henry v. United States*, 361 U.S. 98, 102 (1959) (probable cause exists if "facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed); *Carroll v. United States*, 267 U.S. 132, 162 (1925). This higher standard is required because the intrusion on the privacy and liberty of the individual is vastly more severe in the case of arrest. The arrest "is the initial stage of a criminal prosecution" and it is "inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows," *Terry, supra*, 392 U.S. at 26. When measured against this standard, Officer Lattin was completely unjustified in arresting respondent for the crime of vagrancy as defined by the Henderson ordinance. The vagrancy ordinance is written in the conjunctive, and it has three basic elements, (See Part III, *supra*). Thus, in order to be guilty of vagrancy all three elements must be violated. For convenience, the absence of probable cause will be discussed with respect to each separate element.



**A. Officer Lattin did not have probable cause to believe that respondent was loitering or wandering from place to place without apparent reason or business.**

Officer Lattin observed respondent walking with a companion in an open shopping center during daylight business hours. There were many other people also walking in the shopping center. Respondent and his companion were walking quickly, and when Officer Lattin stopped respondent he was walking from the parking lot towards one of the department stores.

There is no evidence that respondent and Mr. Chaney were wandering aimlessly about because Officer Lattin's observation of respondent and Mr. Chaney lasted for only a very short time. Nor could it be said that they were walking up and down in a manner consistent with "casing" a store for a possible robbery. Compare *Terry, supra*, 392 U.S. at 23 (suspects walked past store, and peered in approximately 24 times). Since their manner of walking could be explained by any number of innocent reasons, their major sin seems to be that they "appeared" to look at the police cruiser several times. Any citizen, no matter how innocent, is likely to pay close attention to a uniformed policeman in a marked car who appears to be paying close attention to him. This is especially so if the police car makes a U-turn. Certainly, every citizen who looks at a police car and walks the other way is not subject to arrest.

Officer Lattin pulled his cruiser up behind Mr. Powell and honked his horn. Since Mr. Powell did not turn around, and had previously only "appeared" to look at the police car, he may not have known that it was the police car behind him. In any event, this ambiguous gesture on the part of the officer got an equally ambigu-

ous response–respondent kept walking towards the department store. When the officer alighted from his car and said "wait a minute," respondent stopped and turned around. He did not, as petitioner asserts (Petitioner's Brief, pp. 7, 53), fail to obey any command of the officer.

Since all of this transpired during daylight in a business area containing many people walking about, respondent's business was certainly as "apparent" as was every other shopper's. Indeed, respondent himself was probably more apparent, since respondent was dressed in an orange suit (App. 9).

Officer Lattin, therefore, did not have probable cause to believe that this portion of the ordinance had been violated.

**B. Officer Lattin did not have probable cause to believe that respondent had refused to identify himself and to account for his presence when requested to do so.**

When asked for identification, Mr. Powell said that it had been recently stolen. When asked for his name and birth date, Mr. Powell gave his true name and birth date. Officer Lattin checked the name through the Henderson police department and there were no "wants" for Mr. Powell. The officer testified that he had no reason to believe that the name and age were false other than his "own suspicious nature."

When he asked where he had been staying and for how long, he replied that he had been staying with friends in Las Vegas for a few days. He did not know their names or the address. When asked where he was going, he replied that he was going back to Michigan. Although Officer



Lattin thought that it was unreasonable in his opinion to go to Michigan via Henderson, he testified that one could go to Michigan via Henderson (App. 12), and he had no reason to doubt that respondent was going to Michigan (App. 13). Actually, it is more reasonable for a wintertime traveler to take the southern route (U.S. 66), and to do so he would pass by Henderson. (See n. 2, *supra*).

Mr. Powell was never asked why he was in the shopping center, or why he was going to Michigan via Henderson,[36] or why he was walking in the manner which gave rise to Officer Lattin's suspicions. Thus, having never been requested to account for his presence, he hardly could have been guilty of refusing to do so. He did not refuse to identify himself, nor did he refuse to tell the officer where he was going, and the officer testified that he had no reason to disbelieve the answers–other than his "own suspicious nature." Of course, the officer's suspicious nature is just the kind of "inarticulate hunch" which this Court held insufficient to sustain even a stop, much less a full custodial arrest. *Terry, supra*, at 22.

The only portion of the dialogue between Officer Lattin and respondent that could conceivably constitute a "refusal" to account for respondent's presence would be his inability to give the names and addresses of the friends he had been staying with in Las Vegas for the past few days. However, a requirement that one relate where he had been staying for the past few days in a different city can hardly be said to come fairly within the meaning

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[36] Henderson is a small gambling center near Las Vegas. It is also on the route to Boulder Dam, a world famous tourist attraction and vacation spot. Also, to reach U.S. 66 from Las Vegas one would pass by Henderson.

of a law requiring that one "account for his presence." The plain meaning of the "account" section of the ordinance is that one must respond with some explanation for his immediate presence and conduct.

Even if "account" could be fairly said to include a prior history spanning several days, respondent did not *refuse* to "account." He told Officer Lattin that he had been staying in Las Vegas for the past few days, but that he did not know the names and addresses of the people with whom he had stayed. While this inability may seem strange at first, it is not surprising given the class of those who are often arrested for vagrancy. *See Papachristou, supra*. In fact, at respondent's trial, the court asked one of the witnesses, Mr. Buckley, where he was staying so that he could be contacted if further testimony were required. The witness replied that he did not know the address of his present residence (Tr. 130).

Thus, Officer Lattin did not have probable cause to believe that respondent had refused to identify himself and account for his presence.

**C. Officer Lattin did not have probable cause to believe that the surrounding circumstances were such as to indicate to a reasonable man that the public safety demanded the identification of respondent.**

As discussed *supra*, this clause is perhaps the most clearly violative of the Fourth Amendment because it criminalizes the status of being a suspicious person, thus allowing full custodial arrest and prosecution for what, under *Terry*, would at most be sufficient to justify a brief stop and limited inquiry. It is also a difficult clause to



interpret in the context of probable cause, because apparently one must ask whether the officer had probable cause to believe that a reasonable man would have had reasonable suspicion that respondent had been or was about to engage in some undefined criminal conduct. Nevertheless, even applying this standard, the arrest of respondent was unjustified.

Officer Lattin had no reports of suspicious prowlers, nor was he patrolling in a high crime area. He did not testify that any crimes had recently been committed in the area. He did not know anything of the shooting in California, nor did he know respondent, respondent's reputation, or respondent's companion. See *U.S. v. Harris*, 403 U.S. 573 (1971). Respondent was not abroad at an unusual hour or in an unusual place. See *People v. Caylor*, 6 Cal. App.3d 51, 85 Cal. Rptr. 497 (1970); *People v. Weger*, 251 Cal. App.2d 584, 59 Cal. Rptr. 661 (1967). He and his companion were walking in an open shopping center where one would expect to see people walking about. In addition, since respondent was dressed in conspicuous attire, it is unlikely that he was about to engage in some clandestine activity.

Thus, the only conduct on which Officer Lattin could rely to justify this arrest was the manner in which respondent and his companion were walking and "apparently" looking at the police car. Respondent neither took flight upon the appearance of the officer, nor did he manifestly appear to attempt to conceal himself.[37] Of-

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[37] The ALI's Model Penal Code, Proposed Official Draft Section 205.6 (1962), a more narrowly drawn law than the Henderson ordinance, specifies that flight or a manifest attempt to hide are among the considerations the officer may take into account in deciding whether the circumstances "warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or

ficer Lattin, because of his "suspicious nature," interpreted the manner in which respondent and Mr. Chaney were walking as possibly being motivated by some unidentifiable sinister purpose. Inexplicably, however, Officer Lattin never asked respondent why he was walking in the shopping center. Apparently, rather than give respondent an opportunity to explain the conduct which gave rise to the officer's suspicions, Officer Lattin preferred to substitute his own interpretation of respondent's based on the officer's own "suspicious nature."

Unless the requirement for specific, articulable facts is to be abandoned, an officer may not be permitted to assume a sinister purpose underlies otherwise innocent conduct. To do so would be to abandon the security of every citizen to the "inartuculate hunches," "volatile or inventive imagination," or "suspicious nature" of the police. *Terry, supra*, 392 U.S. at 22, 28. This Court has consistently refused to do so. *Terry, supra*, at 21, 22; *Brignoni-Ponce, supra*. Officer Lattin, therefore, did not have sufficient reasonable suspicion to justify a brief stop, much less sufficient probable cause to justify a full custodial arrest of respondent.

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property in the vicinity." Where adopted, this law has had mixed reviews. *Compare City of Portland v. White*, 9 Ore. App. 239, 495 P.2d 778 (1972) (unconstitutional), *with State v. Ecker*, 17 Crim. L. Rep. 2001 (constitutional if narrowly construed).



## VII

## THE SCOPE OF FEDERAL HABEAS CORPUS JURISDICTION PROPERLY INCLUDES THE SEARCH AND SEIZURE CLAIMS OF STATE COURT PRISONERS

Petitioner urges this Court to abandon its holding in *Kaufman v. United States*, 394 U.S. 217 (1969), and deny to state prisoners the use of federal habeas corpus as a means to have their Fourth Amendment claims reviewed in federal court. This Court has consistently taken jurisdiction over such cases, thus affirming that search and seizure claims are within the proper scope of habeas corpus. See *e.g., Warden v. Hayden*, 387 U.S. 294 (1967); *Carafas v. LaValle*, 391 U.S. 234 (1968); *Mancusie v. DeForte*, 392 U.S. 364 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Lefkowitz v. Newsome*, ___ U.S. ___, 43 L. Ed.2d 196 (1975). The argument goes that to permit search and seizure claims to be raised on federal habeas corpus is contrary to the public interest. Petitioner bases this contention on the questionable premise that the benefits afforded society and the state prisoner by the remedy do not justify certain resulting costs.

Petitioner ignores completely what ought indeed to be the fundamental question: Is the scope of habeas corpus as it exists today that which is intended by Congress? It is properly the function of Congress to determine the limitations to be applied to the writ, and its legislative purpose should be respected, not frustrated. Furthermore, the policy arguments advanced in support of

limiting the writ, particularly finality considerations, while not without merit as applied to federal prisoners,[38] are considerably weakened in the case of the state prisoner raising federal constitutional claims. These arguments will be considered in turn.

**A. The present scope of federal habeas corpus jurisdiction, over search and seizure claims, comports with the intent of congress as embodied in §2254, and any modification of this jurisdiction is properly a legislative function.**

Historical data indicates that the Habeas Corpus Act of 1967 was intended by Congress to extend federal habeas corpus power to the greatest possible extent. See *Fay v. Noia*, 372 U.S. 391, 415-17 (1963); *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963), *Ex Parte McCardle*, 73 U.S. 318, 325-26 (1868). The language of the Act is very broad in providing that the federal courts

> "... shall have power to grant writs of habeas corpus *in all cases* where *any person* may be restrained of his or her liberty *in violation of the constitution* or of any treaty or law of the United States. ..." Act of February 5, 1867, ch. 28, 1, 14 Stat. 385. (emphasis added).

The purpose of Congress in enacting the statute was to create a remedy independent of, both in its existence and its exercise, direct appellate review. This jurisdictional

[38] *Kaufman v. United States, supra*, involved a *federal* prisoner seeking federal habeas corpus. The Solicitor General in *Kaufman* conceded that habeas corpus should be available to review state prisoners' claims and agreed only that it should be unavailable to federal prisoners.



grant is virtually unrestricted, and it has remained so for over 100 years.

Although the courts at the outset, influenced by traditional notions of habeas corpus (*Developments in the Law–Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1049-50 (1970) (hereinafter cited as *Developments*)), viewed the writ as narrow in its scope (Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 465-66 (1966)), its development since that time has been characterized by a continual expansion of cognizable issues. Cf. *Ex Parte Siebold*, 100 U.S. 371 (1879) (constitutionality of statute could be considered on habeas corpus); *Frank v. Mangum*, 237 U.S. 309 (1915) (due process claim cognizable on habeas corpus); *Moore v. Dempsey*, 261 U.S. 86 (1923) (federal claims previously considered by state judiciary properly redetermined by federal habeas judge); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (federal habeas proceedings proper to consider claim of denial of counsel); *Waley v. Johnston*, 316 U.S. 101 (1962) (writ available to consider constitutional claims as well as questions of jurisdiction).

This expansion was fully compatible with the legislative intent in passing the Act. The 1867 Act was only one of a series of federal statutory and constitutional changes expanding federal jurisdiction after the Civil War. It was a time when "nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." *Zwickler v. Koota*, 389 U.S. 241, 246 (1967); Tushnet, *"Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte,"* 1975 Wisc. L. Rev. 484, 489-91. Thus, only one year after enacting the Habeas Corpus Act of 1867, the Fourteenth Amendment was

adopted. The Civil Rights Act of 1871 was adopted, as was the Judiciary Act of 1875 giving federal courts general federal-question jurisdiction. Numerous removal statutes were also adopted between 1863 and 1866. A. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. of Pa. L. Rev. 793, 829 (1965). The pre-war policy of looking to state courts for vindication of federal rights was completely altered by Congress. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974); *Zwickler v. Koota, supra*. Congress even went so far as to modify the long standing rule against federal court interference with pending state proceedings (see 28 U.S.C. §2283) by adopting the 1871 Civil Rights Act (42 U.S.C. §1983). *Mitchum v. Foster*, 407 U.S. 225 (1972).

Against this background, it is not surprising that Congress wedded the scope of habeas corpus to the Constitution. Congress was in an expansive mood and painted with a broad brush. The legislative history of the Act supports the broadest jurisdiction (Tushnet, *op. cit. supra*, 1975 Wisc. L. Rev. at 489-91), and in interpreting the new Act, this Court in *Ex parte McCardle*, 73 U.S. 318, 325-26 (1868), decided only one year after the Act's adoption, stated:

> This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.

Thus, federal habeas corpus jurisdiction, like general federal-question jurisdiction, was made a function of the Constitution, treaties and laws of the United States. And



habeas corpus, like federal-question jurisdiction, was free to vary with the growth of the federal rights of those charged with crimes in state courts. See Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 20 (1956). The expansion of due process rights led naturally to a corresponding expansion of habeas corpus to vindicate those rights. Habeas corpus thus evolved as a means to assure compliance by the states with the constitutional notion of due process.

Those who argue that federal habeas corpus is now different in scope and function from what habeas corpus was in 1867 miss this essential point: The scope of the writ cannot be artificially crystallized and frozen out of the stream of time (Sokol, *Federal Habeas Corpus*, pp. 19-20 (2d. Ed. 1969). It would make no more sense to limit federal habeas corpus in light of its 1867 scope than it would to restrict federal-question jurisdiction to only those federal causes recognized at the time of its adoption in 1875. The writ has never been

> "... a static narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

Once it is determined by this Court that a particular constitutional right must be recognized by the states, then the failure to recognize that right in a state process brings a convicted person within the ambit of the 1867 Act.

If there was any doubt regarding the scope of the writ, it was dispelled by the Court's decision over 20 years ago in *Brown v. Allen*, 344 U.S. 443 (1953). The court in *Brown* held that all federal constitutional questions raised by state prisoners were reviewable on federal habeas

corpus. The federal judge must independently apply the correct constitutional standard to the facts underlying a constitutional claim, no matter how fairly and completely the claim has been litigated in the state courts:

> "... The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right..." *Brown v. Allen, supra*, 344 U.S. at 508 (Frankfurter, J., concurring).

Implicit in the opinion was a recognition that habeas corpus provides a procedural device through which federal rights are vindicated and state enforcement of those rights is supervised. See *Developments, supra*, at 1061-62. This Court thus confirmed the mandate of the statute and established an unequivocally broad role for the federal habeas jurisdiction.

The Court in *Fay v. Noia*, 372 U.S. 391 (1963), went further and recognized habeas corpus as an established procedure which provides a remedy for any restraint considered to be contrary to fundamental rights. Thus as due process rights evolved and expanded, the writ became available as a remedy for the violation of those rights. While the Court in *Fay* did not expressly rule that Fourth Amendment claims would be cognizable in federal habeas corpus proceedings, the underlying rationale was that habeas was properly available as a remedy for any violation of due process. At the time of the *Fay* decision, this Court had already applied the exclusionary rule to the states. *Mapp v. Ohio*, 367 U.S. 643 (1961). Subsequent cases made it clear that a state prisoner's Fourth Amendment claims could indeed be heard in federal habeas corpus proceedings. *See e.g., Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967).



Given the breadth of *Brown* and *Fay* together with the holding in *Mapp*, it was natural that the number of habeas corpus petitions would expand accordingly. As Congress was fully aware, in fiscal 1963, 1,692 applications were filed by state court prisoners; in 1964; 3,248 applications were filed; and in 1965, 4,845 applications were filed. (1966 Director of Administrative Office of the United States Courts Annual Report Table, S. Rep. No. 1797, 89th Cong., 2d Sess. 10 (1966)). In response to this growing number of habeas corpus applications in the federal courts, Congress, in 1966, amended the habeas corpus statute to expedite the disposition of these applications by state court prisoners. (28 U.S.C. §2254(d) (Supp. IV, 1969), amending 28 U.S.C. §2254 (1964)).

Congress was surely aware at the time it amended the statute that of the growing number of petitions, many were based on Fourth Amendment claims. *See e.g., Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963); *U.S. ex rel. Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963), *aff'd* 381 U.S. 618 (1965); *California v. Hurst*, 325 F.2d 891 (9th Cir. 1963); *U.S. ex rel. Anglet v. Fay*, 33 F.2d 12 (2d Cir. 1964); *Sisck v. Lane*, 331 F.2d 235 (7th Cir. 1964); *Hubbard v. Tinsley*, 336 F.2d 854 (10th Cir. 1964); *Burnside v. Nebraska*, 346 F.2d 88 (8th Cir. 1965). Evan Bator's article (Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (hereinafter cited as Bator)) was three years old, and the arguments for limiting Fourth Amendment claims on habeas corpus were well known. Nevertheless, rather than placing any limitation on writs of this particular nature, Congress instead sought to decrease the number in their totality, and to expedite the disposition of those filed, through a qualified application of the doctrine of res judicata. By according a

presumption of correctness to factual determinations made by state courts and fixing on the petitioner the burden of proof as to certain factual issues, Congress contemplated the elimination of a substantial number of nonmeritorious and repetitious applications. S. Rep. No. 1797, 89th Cong., 2d Sess. 10 (1966) (Report of the Committee on Habeas Corpus, Judicial Conference of the United States, Sept. 1965). A state court suppression hearing is exactly the kind of hearing to which the federal court would defer under the amended Section 2254.

Thus Congress, by requiring exhaustion of available state remedies and according a limited res judicata effect to state court hearings, struck a balance between the autonomy of the state courts and the finality of their decisions on the one hand, and the acknowledged right of the federal courts on the other to review constitutional questions on habeas corpus.[39] Had it desired to limit the scope of federal review in light of *Brown, Mapp*, and the numerous Circuit Court of Appeals decisions allowing Fourth Amendment claims to be raised, Congress would have undoubtedly done so. Rather, the objective of the amendment was to reaffirm the role of habeas corpus as a proper vehicle for federal review. Through the elimination of frivolous applications, a proper focus on those applications deserving consideration is promoted. Furthermore, the legislation was intended as a strong inducement to the state courts to safeguard the constitutional rights of defendants. *Id*. The Amendment provides that if

[39] Earlier federal review of state court prosecutions is barred by considerations of comity and federalism. *Compare Dombrowski v. Pfister*, 380 U.S. 479 (1965) *with Younger v. Harris*, 401 37 (1971). *See* 28 U.S.C. §2283; *Mitchum v. Foster*, 407 U.S. 225 (1972).



the state proceeding was deficient in any one of eight respects, the presumption of correctness is eliminated. The violation of due process is one of these criteria, thus evidencing the intention of Congress to include all constitutional claims within the ambit of Section 2254.

Congress has had several opportunities to consider limitations on habeas corpus jurisdiction, but has consistently refused to do so. All of the arguments for limiting the writ were pressed on Congress in 1956, when a bill to limit habeas to cases where the state had not granted the defendant an adequate opportunity to litigate the issue was under consideration. That legislation failed to pass. *See* Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L. J. 50, 51 57 (1956). Similar legislation was proposed in 1958 and again in 1959, but on both occasions was rejected. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 523 (1966).

Again, in 1971 Mr. Justice Rehnquist, then Assistant Attorney General representing the Department of Justice, ably pressed petitioner's arguments on Congress when he gave testimony before the Subcommittee on Constitutional Rights with respect to S. 895, 92d Cong., 1st Sess. (1971). Hearing, Sept. 14, 1971. Modification of the exclusionary rule by adoption of some alternative method of enforcing it was suggested. *Id*. at 97. It was urged that the writ should be confined to issues that go to guilt or innocence, thus eliminating Fourth Amendment claims. *Id*. at 97-104. Both Professor Bator's and Professor Oaks' articles were pressed on the committee. *Id*. at 99, 103. This Court's decision in *Whitely v. Warden*, 401 U.S. 560 (1971) was cited as the most recent example of the kind of case which should be

removed from the ambit of federal habeas corpus. *Id.* at 99-100. Present habeas corpus practice was said to be unwise because it involved too much federal judge time (10,892 filings in 1970). *Id.* at 101. Although the Department of Justice did not urge that the writ "be restricted to the role it played at the time of the adoption of our Constitution," the expansion of the reach of the writ was noted as a reason for Congress to restrict its scope. *Id.* at 100-01. It was urged that the state's interest in finality, and the lessened deterrent impact of a ruling coming a number of years after the search also justified modifying the scope of habeas corpus in Fourth Amendment cases. *Id.* at 98, 103. In spite of these arguments, Congress again declined to modify the existing scope of habeas corpus.

In 1973, legislation which reflects the opinion of Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (Powell, J., concurring), was again introduced to the 93rd Congress. *See* Comment, *Proposed Modification of Federal Habeas Corpus for State Prisoners–Reform or Revocation*, 61 Geo. L. J. 1221 (1973). Despite the arguments made for limiting the writ, Congress has rejected every opportunity to do so. Under accepted standards of statutory court construction judicial acceptance of federal habeas jurisdiction in search and seizure cases together with Congress' failure to reject this reasonable interpretation of the wording of §2254, establishes beyond doubt that jurisdiction in such cases is proper. *Blue Chip Stamps v. Manor Drug Stores*, ___U.S. ___, 44 L. Ed.2d, 547-48 (1975).



**B. The advantages of Federal habeas corpus as a means of protecting the fourth amendment rights of prisoners outweigh any countervailing interests in the finality of state court judgments**

Petitioner argues that society's interest in the finality of litigation is such that application of the exclusionary rule ought to be abolished within the context of federal habeas corpus for state prisoners. Congress itself contemplated a greater degree of finality when it passed the 1966 amendments (S. Rep. No. 1797, 89th Cong., 2d Sess. 10 (1966)), yet sought to implement this desire by limiting federal review of factual issues while doing nothing to restrict the scope of habeas corpus as a procedural safeguard. There is no greater need for finality today than existed in 1966 when Congress acted.

In the case of the federal prisoner, there may be merit to the finality argument as advanced by petitioner. This Court in *Kaufman* refused to distinguish federal prisoners from state prisoners on the grounds that the federal prisoner will always have had an opportunity to raise his claim in a federal court. The Court made clear that all constitutional claims are cognizable in a §2255 (28 U.S.C. §2255) proceeding brought by a federal prisoner, just as *Brown* has indicated that habeas corpus is unrestricted as to the constitutional questions which can be raised by state prisoners. However, some commentators have criticized this aspect of habeas corpus as unnecessarily providing the federal prisoner with a duplication of opportunities within the same system. See Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964); *cf.* Bator, *supra*, at 518. It can be argued that once he has obtained direct review in a

federal Court of Appeals, the requirements of a separate proceeding in a federal forum are satisfied.

Regardless of the merit of these arguments as applied to the federal prisoner, the state prisoner is clearly in a much different position. State prisoners, unlike federal prisoners, may not have the opportunity to have a federal court review their federal constititional claims until a writ for federal habeas corpus has been filed. The ultimate right of a state criminal defendant to have a federal court and federal judges pass upon his federal contentions cannot be secured solely by the Supreme Court's power to review state judgments. The structure of this Court's *certiorari* jurisdiction is incapable of providing adequate protection, both because the sheer volume of cases precludes consideration of the claim of every state prisoner whose constitutional rights have been violated, and because this Court will not hear a case merely because it believes that case may have been erroneously decided. See *Bator, supra,* at 513; Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 464 (1966). These factors combine to prevent access to *certiorari* from being a "normal appellate channel in any sense comparable to the writ of error." *Fay v. Noia, supra,* at 436. See also Hart, *Foreword: The Time Chart of the Justices, The Supreme Court: 1958 Term,* 73 Harv. L. Rev. 84 (1959).

Given this practical impossibility, state prisoner claims regarding federal constitutional protections, including Fourth Amendment protections, can only be subjected to systematic federal court review through the use of federal habeas corpus. Indeed, without access to federal habeas corpus, it is unlikely that Mr. Powell would ever have had an opportunity to challenge the constitutionality of the search pursuant to Henderson's vagrancy statute in a



federal court. Until respondent's case, this Court had not considered these issues either "certworthy" or "appealworthy." In *Lefkowitz v. Newsome,* __ U.S. __, 43 L. Ed.2d 200 (1975) this Court granted *certiorari* on the issue of the appropriateness of federal habeas corpus, but declined to grant certiorari on the issue of the constitutionality of the vagrancy law under which the evidence had been suppressed. See also, *People v. Berk*, 32 N.Y.2d 567, 300 N.E.2d 411, *cert. denied*, 414 U.S. 1093 (1973); *People v. Solomon*, 33 Cal. App.3d 429, 108 Cal. Rptr. 867 (1973), *cert. denied*, 414 U.S. 951 (1974) (identical California statute); *People v. Weger*, 251 Cal. App.2d 584, 59 Cal. Rptr. 661 (1967), *cert. denied*, 389 U.S. 1047 (1968) (identical California statute).

Petitioner cites an article by Professor Amsterdam as authority for the argument that finality considerations warrant the denial of habeas in cases such as the one presently before the Court. Brief for the Petitioner, pp. 42-43. The quoted section is misleading, however, in that petitioner fails to note that Professor Amsterdam was specifically addressing himself to the problems of collateral relief for federal prisoners. The issue at hand is an entirely different one. Professor Amsterdam himself states in the introduction in his article that one must distinguish at the outset the problem of federal habeas corpus for state prisoners:

> ". . . there are substantial justifications for federal district court litigation or relitigation of federal contentions invoked in bar of a state criminal conviction. Volume of cases and inadequate state procedures make reliance on the Supreme Court unsatisfactory here; the Court is not properly a routine enforcement agency; in any event, . . . *it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal*

*constitutional claim*." Amsterdam, *Search, Seizure, and Section 2255*, 112 U. Pa. L. Rev. 378, 379-80 (1964) (emphasis added).

Amsterdam goes on to note specifically that federal habeas corpus lies to review a state prisoner's claim based on *Mapp. Id.* at 380, fn. 13.

In his concurring opinion in *Schneckloth*, Justice Powell quotes Professor Amsterdam in support of the argument that finality interests warrant the limitation of the writ

> "Professor Amsterdam has noted that 'for reasons which are common to all search and seizure claims,' he 'would hold even a slight finality interest sufficient to deny the collateral remedy.' " *Schneckloth v. Bustamonte, supra,* at 262 (quoting Amsterdam, *supra*, at 388).

It should be noted, however, that Professor Amsterdam goes on to state:

> "In the case of federal habeas for state prisoners, the total impact of the finality considerations as they operate uniquely upon each habeas corpus case is a part of the gross price which the federal system pays under *Brown v. Allen* to give the prisoner his federal judge. The price is high, no doubt, but the stakes are also high for the prisoner, and the alternatives–leaving federal "fact," together with much of federal "law," to the state trier; establishing federal removal jurisdiction over state criminal cases involving federal defensive claims–seem no less unsatisfactory." Amsterdam, *supra*, at 385, fn. 33.

It is clear that the concern of Professor Amsterdam for finality does not apply as forcefully to federal habeas corpus for state prisoners as it does to the problem of collateral relief for federal prisoners. But see, *Schneckloth v. Bustamonte*, 412 U.S. at 272, fn. 16 (Powell, J., concurring).



The argument to limit the scope of the writ in the interest of finality seems to ignore the important functions which the federal courts perform. First, providing a separate federal forum isolated from state procedures permits a proper focus on the constitutional questions involved in a given case. There is substantial justification for such a dispassionate second look, since the proximity of state judges to the enforcement of state substantive law may cause them to focus primarily on ensuring that the guilty are punished and seeing that society is protected by their detention. Such concerns may unconsciously affect their disposition of the constitutional claims. See *Developments, supra,* at 1057-61; Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N. Car. L. Rev. 633, 641-42 (1974).

Moreover, providing a federal forum creates a greater likelihood of uniform application of federal constitutional law in all state court determinations. *Id., Development* at 1057-61. This is entirely proper, for Congress has designated district courts, in light of the Supremacy Clause of the Constitution, to entertain post-conviction claims based on the misapplication of federal law by state courts:

> "The fact that Congress has authorized district courts to be the organ of higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted." *Brown v. Allen, supra,* 344 U.S. at 510.

Certainly the several states are sovereign entities and are not simply compartments of a central government. Undoubtedly many state judges and prosecutors are

irritated by the intrusion of federal law and federal courts into state criminal procedure. Theoretically, state courts are charged with the same responsibility as the federal courts for the application of federal law. But in actual practice, there are numerous instances of a woeful disregard for federal law in state court proceedings. (See American Civil Liberties Union's Amicus Brief for Respondent, pp. 18-27). If federal rights are to be adequately enforced, there must exist sanctions for their breach. As previously discussed, reliance upon direct review by the Supreme Court as the exclusive means of enforcement would be illusory. To the extent that the federal forum is closed to state prisoners, there is certain to be a marked dimunition in the meaningfulness of those rights which the Constitution guarantees.

Petitioner maintains that whatever deterrent function the exclusionary rule may serve when applied on trial and appeal becomes greatly reduced on collateral review. This argument fails to recognize that the purpose of the exclusionary rule is general deterrence. Its function is not to punish the erring officer, but to ensure that impermissible conduct will be forcefully discouraged through its threatening sanctions. The removal of federal habeas corpus jurisdiction would necessarily emasculate the rule. Police would reasonably foresee the resolution of search and seizure issues primarily by state trial judges "inclined unduly to reflect in their decisions the substantive goals of the state criminal law, primarily focusing on ensuring that the guilty are punished and on protecting society by their detention." *Developments, supra,* at 1061. Thus the deterrent effect of the sanction would be weakened with the police perception that search and seizure questions would be resolved in a friendly forum. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.



Chi. L. Rev. 665, 724-25 (1970). Also, elimination of federal habeas corpus would be read as a sign that the Fourth Amendment is in disfavor, thus further encouraging police and legislatures to attempt further inroads into the values protected by the Amendment.

It should also be recognized that the exclusionary rule is directed not only at illegal police conduct, but also at the violation of constitutional liberties by the entire criminal justice system. Apart from any deterrent effect on questionable police practices, the exclusionary rule occasions judicial review of and lends credibility to constitutional guarantees, thus demonstrating that serious consequences attach to violation of constitutional rights.

> "The availability of post-conviction relief serves significantly to secure the integrity of proceedings at trial and on appeal . . . . Thus collateral relief, . . . contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process." *Kaufman v. United States*, 394 U.S. 217, 228-29 (1969).

Unconstitutional statutes are not shielded from the rule's impact. Unless legislatures are deterred from enacting, or allowing to remain, statutes like the one under the authority of which Mr. Powell was arrested, the legislative process in effect becomes a vehicle for illegal police searches and seizures, and judicial integrity is tarnished in the implementing process.

It is speculative to suggest that allowing state court prisoners to seek habeas corpus relief has an adverse effect on the rehabilitative process. Certainly the effect is no more adverse than allowing the prisoner to pursue any other type of post-conviction relief. Indeed the therapeutic effect of working within the system to defend due process rights may be great. Certainly respondent's ef-

forts in this regard have not hindered his rehabilitation–he has been released and is now on parole.

The argument that the present scope of federal habeas corpus places an unduly heavy burden on the federal courts and is an unwise allocation of judicial resources is unconvincing. Although there has been a substantial increase in the number of petitions over the past twenty years (*Schneckloth v. Bustamonte, supra,* 412 U.S. at 260, fn. 14 (Powell, J., concurring)), federal courts allocate relatively little time to habeas corpus petitions. Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners–Reform or Revocation*?, 61 Geo. L. J. 1221, 1246 (1973)) and only rarely require extensive evidentiary hearings since most of the petitions are decided at the pleading stage (LaFrance, *Federal Habeas Corpus and State Prisoners: Who's Responsible*?, 58 A.B.A.J. 610, 612 (1972). The vast majority of prisoners are unsuccessful, and only a small number of state retrials are required; at the time of the *Schneckloth* decision, statistics indicated that in about ninety-six percent of the prisoner petition cases the relief prayed for was not granted. *1971 Director of Administrative Office of the United States Courts Annual Report 132.*

In the absence of any statistics with respect to how many habeas corpus filings involve only Fourth Amendment issues, it is pure speculation that elimination of them would substantially diminish the case loads of federal judges. In addition, many of the Fourth Amendment habeas writs are easily disposed of. Even assuming that the prisoner has exhausted his available state remedies and is properly in the federal court, many of the writs involved claims of Fourth Amendment violations under recent cases of this Court. Since new search and seizure rulings are seldom retroactive, if the search anti-



dated the applicable case, the writ is dismissed on those grounds. In the event that the search post-dated the applicable law, if the state held a full hearing, then the federal judge would defer to the state hearing and decide only as a matter of law whether the search violated the Fourth Amendment. If the state court has failed to hold a full and fair hearing, the federal judge may consider retaining jurisdiction in the case while affording the state court the opportunity to hold a hearing. *See Sieling v. Eyman*, 478 F.2d 211, 215 (9th Cir. 1973) (writ granted unless within appropriate time the state held a hearing on petitioner's competency to stand trial). Thus, it is doubtful whether eliminating Fourth Amendment claims from habeas corpus jurisdiction would have any substantial impact on federal judge's workload. Certainly, if this Court is going to repeal Congress' jurisdictional statutes, diversity jurisdiction is a far better candidate than habeas jurisdiction. *See* Wulf, "*Limiting Prisoner Access to Habeas Corpus–Assault on the Great Writ*," 40 Brooklyn L. Rev. 253, 272 (1973).

Certainly there is an interest in finality arising from the added costs of continuing the legal process, but it is submitted that the approach of Congress in amending §2254 is more satisfactory than any limitation on the writ proposed by petitioner. Cost considerations seem an unpersuasive justification for limiting collateral vindication of constitutional claims, for the interest in preventing unlawful government action which impairs individual rights can hardly be measured in monetary terms.

The suggestion has been made that federal courts should not hear search and seizure claims on habeas corpus because such claims are not based on the guilt or innocence of the state prisoner. *Schneckloth v. Bustamonte*, 412 U.S. 218, 256-58 (1973) (Powell, J., con-

curring). This assertion ignores the historic role of habeas corpus. Since 1867 the writ has involved more than the question of innocence, its principle role being a means to vindicate due process rights and to assure that these rights will be adequately enforced by the states. *See, e.g., Fay v. Noia,* 372 U.S. 391, 402 (1963); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L. J. 895, 895-96, 958-85 (1966); Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N. Car. L. Rev. 633, 639 (1974). It has already been established that the expansion of grounds for federal habeas corpus has quite properly corresponded to the evolving standards of due process. Yet, it is argued that under this the federal courts should be limited solely to the examination of the trial record in order to determine "whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 250.

If this "fair opportunity" standard were adopted any reduction in the federal court caseload would be minimal. Federal courts would still be required to examine the record in order to determine whether the state court prisoner was afforded a fair opportunity to have his federal claims adjudicated. Friction would be increased, for a finding that a state court erred in the determination is not nearly as disparaging as would be a finding that a state court did not grant a fair hearing. Furthermore, in cases such as this where the California Court of Appeal, in an unpublished opinion, avoided resolving the constitutionality of petitioner's arrest and search by a clearly erroneous application of the harmless error rule in *Chapman v. California*, 386 U.S. 18 (1967), it would be extremely difficult to conclude whether or not a fair



hearing on the constitutional question was afforded (the opinion of the Court of Appeal is attached on Appendix C to the petition for writ of certiorari).

Only last term, this Court recognized the right of a state prisoner to raise a Fourth Amendment claim on federal habeas corpus though his conviction was based on a guilty plea. *Lefkowitz v. Newsome,* __ U.S. __, 43 L. Ed.2d 196 (1975). Under a relatively unique New York Law (NY Penal Law §220.05, now §220.03), a defendant could properly enter a guilty plea and still preserve his constitutional claims asserted in a motion to suppress. Despite his well-counseled admission of guilt, this Court held that Mr. Newsome had not waived his search and seizure claims for federal habeas corpus purposes. Three Justices argued, for the reasons stated in *Schneckloth*, that the voluntary confession of guilt should have precluded any consideration of the claims on habeas corpus. *Lefkowitz v. Newsome, supra,* __ U.S. __, 43 L. Ed.2d at 209-20. (Powell, J., joined by Burger, C. J. and Rehnquist, J., dissenting). The remaining members of the Court, however, refused to adopt this view, the majority maintaining that where a guilty plea did not constitute a forfeiture of the right to judicial review of search and seizure claims in the state court, such issues could be considered on federal habeas corpus. *Id.* at 203.

California, like New York, permits a defendant to appeal specified adverse pretrial rulings even though he subsequently pleads guilty. Cal. Penal Code §1538.5(m); *Lefkowitz v. Newsome, supra,* __ U.S. __, L. Ed.2d at 201 n. 3. If this Court were to adopt the position in *Schneckloth*, the untenable result would be that only those prisoners who pleaded guilty at trial could have their search and seizure claims reviewed on federal habeas corpus. The prisoner who, like Mr. Powell, when to trial maintaining his

innocence and pursued his claims through all available levels of state appellate review, would nevertheless be foreclosed from review of his constitutional claims in a federal forum. Yet California and New York prisoners who pleaded guilty might reasonably anticipate judicial review of the merits of the alleged Fourth Amendment violation on habeas corpus. There is nothing in either the Fourth Amendment or §2254 to support such an anomalous result.

Moreover, it is quite conceivable that the ramifications of Justice Powell's standard would not ultimately be limited to Fourth Amendment claims. He argues that evidence obtained from an illegal search and seizure is generally reliable, and petitions based upon an unlawful search with no constitutional claim bearing on the prisoner's innocence should not be considered on collateral review. *Schneckloth v. Bustamonte, supra*, 412 U.S. at 258 (Powell, J., concurring). If this were to be the determinative test, then the inadmissibility of coerced confessions would appear destined to join the exclusionary rule in the same constitutional graveyard. This would follow because in *Lego v. Twomey*, 404 U.S. 477 (1971), a habeas corpus case, this Court held that the underlying rationale for the exclusion of coerced confessions is not enhancement of the reliability of the fact-finding process, but the deterrence of illegal methods used to obtain incriminating confessions: *Id*. at 486-87.

> "...We noted in Jackson [v. Denno, 378 U.S. 368 (1964)] that there may be a relationship between the involuntariness of a confession and its unreliability. But our decision was not based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence ....



> The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles. *Lego v. Twomey, supra*, 404 U.S. at 484-85.

Search and seizure claims are no less deserving of federal habeas review than any other constitutional guarantee. To limit the writ to those constitutional claims that affect the determination of guilt and the reliability of the fact-finding process would frustrate the intended purpose of the writ as a procedural device to protect *all* due process rights. Arguments that the writ is inappropriate because it detracts from the finality of judgments, causes friction between state and federal courts, and does nothing to advance the interests of deterrence have all been dealt with here and in the past. Both Congress and the courts including this Court, have consistently rejected these contentions, yet petitioner insists on resurrecting them once again. It is time for this Court to establish and reconfirm that the Fourth Amendment claims of state prisoners are cognizable on habeas corpus, and that any modification of Section 2254 is properly a legislative function.

### C. An arrest authorized by a statute violating the Fourth, Fifth and Fourteenth Amendments is subject to Federal review by habeas corpus.

From the preceding discussion it is clear that *all* Fourth Amendment claims are subject to review by federal habeas corpus. The Court has also asked counsel to address the specific question of whether the validity of *this* search is cognizable under 28 U.S.C.§2254. Respondent suggests that only arrests and searches which are accompanied by violence on the order of pumping the

citizen's stomach should be reviewable on habeas corpus. (Petitioner's Brief, pp. 45-49); *Rochin v. California*, 342 U.S. 165 (1952). Petitioner then argues that an arrest under a statute which violates the Fourth, Fifth and Fourteenth Amendments is a mere "technical" violation of the constitution unworthy of federal court review on habeas corpus.

Respondent cites no authority for the proposition that habeas corpus reaches only some Fourth Amendment violations, but not others. One searches the statute (28 U.S.C.§2254) in vain for even a suggestion that the distinction was contemplated by Congress. Congress originally granted, and in 1966 reconfirmed, jurisdiction with respect to all incarceration in violation of the constitution. Since that grant was reconfirmed by Congress in 1966, a ruling that the statute means anything less would be nothing short of judicial legislation. (See Part VIIA *supra*).

Petitioner's suggestion, in effect, would rewrite the Fourth Amendment. The Amendment secures the people from unreasonable searches and seizures; the constitutional injunction is not addressed only to exceptionally unreasonable searches and seizures accompanied by brutality. Any remedy must be commensurate with the evil to which it is addressed. While petitioner concedes that "no one seriously doubts that evidence seized in wanton violation of the Fourth Amendment rights should be suppressed" (Petitioner's Brief, p. 47-48), apparently petitioner believes that "ordinary," as opposed to "wanton" violations of the constitution need not also be discouraged and should be winked at by the federal courts. Since this Court's *certiorari* review is, of necessity, limited, and this Court will seldom review a state case simply because it is wrong, the impact of Petitioner's



limitation on the effective implementation of the Fourth Amendment guarantee could be substantial. Petitioner's suggestion is nothing short of a covert attack on the Fourth Amendment. If the people are only to be secure from conduct "too close to the rack and the screw to permit constitutional differentiation" (*Rochin, supra*, 342 U.S. at 172), the appropriate constitutional process to amend the Fourth Amendment should be commenced.

Petitioner's suggestion is also a practical and procedural nightmare. District Court judges would not only have to decide whether or not the Fourth Amendment was violated, but they would then have to decide whether the violation was sufficiently flagrant to be "wanton." The unworkability of such a test accounts for the demise of the similar rule in *Rochin v. California*, 342 U.S. 165 (1952). There is nothing in the Fourth Amendment or in 28 U.S.C.§2254 suggesting that the *Rochin* rule should be resurrected at this time, or that Fourth Amendment law should regress to a time which Professor Amsterdam has characterized as "the nadir of fourth amendment development." A. Amsterdam, *Perspectives on the 4th Amendment*, 58 Minn. L. Rev. 349, 393-94 (1974).

Petitioner commits a more fundamental error in classifying the constitutional violations in this case as merely "technical." The fundamental rights violated by the Henderson ordinance are a veritable *tour de force* of the Bill of Rights. The law not only violates incorporated Fourth Amendment search-and-seizure and Fifth Amendment self-incrimination rights, but it also violates fundamental notions of fair notice, the presumption of innocence, and the right to travel interstate. The ordinance is a roving commission to arrest suspicious persons which is just short of a general warrant. (See Part III *supra*). One can hardly imagine a more direct and

egregious violation of the Fifth Amendment than arrest and imprisonment for invoking it. (See Part I *supra*). Arresting citizens for vaguely defined, dragnet crimes is an earmark of totalitarian governments.[40] There is hardly a more fundamental civil right than the presumption of innocence. (See Part II *supra*). Finally, the right to travel among our states, while perhaps not a right sharing the glamour of the proceeding ones, is nevertheless a fundamental privilege of United States citizens. (See Part III *supra*). If only by sheer dint of the number of violations, it cannot be said that the invasion of respondent's rights was merely technical.

Petitioner arrives at the startling conclusion that this case is unworthy of effective federal review by again committing the basic error of assuming that these fundamental rights are secure only from police and not legislative encroachment. (Petitioner's Brief pp. 47-49). It is precisely because the police will rely on the constitutionality of the statute that the people can only be secure in these rights if the federal courts stand ready to measure the law against the commands of the constitution. The fact that the law is still extant in both Nevada and California after 7 1/2 years merely underscores the appropriateness of federal review.

[40] *Papachristou, supra*, 405 U.S. at 168. In *People v. McKelvy*, 23 Cal. App. 3d 1027, 100 Cal. Rptr. 661 (1972), a case involving a California statue identical to the Henderson Ordinance, defendant was arrested while walking across lawns at 3:00 A.M. during a curfew imposed by the Mayor of San Bernardino because of riots. Although the court was not called upon to decide the constitutionality of the ordinance, the Court said "to deprive one of his freedom on such flimsy evidence smacks of totalitarianism. . . ." *Id*. at 666.



Petitioner's assertion that suppression "will have no effect on Officer Lattin, who probably does not remember respondent" (Petitioner's Brief, p. 48) is beside the point. These laws are still on the books, and other legislatures may be contemplating the adoption of similar laws. As explained above, the Fourth Amendment reaches all unreasonable searches and seizures, including those with a legislative origin. Consequently, suppression of the evidence is as appropriate now as it would be if the respondent's arrest took place only yesterday. The only disturbing fact about the 7 1/2 year interval between respondent's arrest and the present date is the fact that, although the evidence should have been suppressed in 1968, respondent has now served practically all of his sentence and is presently on parole. Respondent has pursued his case diligently through the courts ever since his arrest. If a delay in receiving a favorable judgment becomes an excuse for denying respondent relief, such a rule would only encourage states to protract post conviction proceedings in hopes of thereby avoiding an ultimate adverse judgment.

The particular appropriateness of federal review of state statutes which may violate the Fourth Amendment was confirmed by this Court in *Sibron v. New York*, 392 U.S. 40 (1967). In *Sibron* this Court retained jurisdiction to decide whether the statute was constitutional in spite of the fact that the District Attorney had confessed error.[41] To do otherwise would have been "an abdication of our obligation to lower courts to decide cases upon

[41] The confession of error came only after *federal* review became inevitable. See also *Patterson v. Lockhart*, 513 F.2d 579 (8th Cir. 1975) (error confessed on appeal from denial of writ).

proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution." *Id.* at 59.

The particular appropriateness of federal review of state statutes that have been upheld by state court's as constitutional was recognized by Congress when, in attempting to reduce this Court's caseload, Congress nevertheless provided that review may be had by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. §1257(2). This jurisdictional provision

> proceeds on the theory that through inadvertence or design those who are entrusted with the legislative power of a State may exercise the same in a manner forbidden by the Constitution of the United States and that the state courts may uphold such legislation when it should be held invalid. Unlike other state action, legislation consists of rules having continuing force and intended to be observed and applied in the future . . . . *King Manufacturing Co. v. Augusta*, 277 U.S. 100, 104 (1928).

The rule applies even though the state law takes the form of an ordinance (*King, supra*) which is criminal in nature. *Jamison v. Texas*, 318 U.S. 413 (1943), and the state court failed or refused to decide the constitutionality of the statute. *Lawrence v. State Tax Commission*, 386 U.S. 276, 282 (1932). The policy underlying Section 1257(2) is clear—it is important that the constitutionality of statutes, because of their intended broad application, be resolved, and there is a real danger that state courts, because of their proximity to state legislatures, will be hesitant to rule them unconstitutional. Independent federal court review in these circumstances is critical.



Because of this Court's burgeoning caseload, the perceived ease of seeking review by appeal rather than *certiorari* has been largely unrealized. To the extent that this Court, in order to maintain some control over its docket and to assure proper attention to all its cases, finds it necessary to treat *certiorari* and appeal similarly, the congressional scheme breaks down. Since the need for federal review has not diminished (indeed, with the gradual incorporation or absorption of the Bill of Rights in the Fourteenth Amendment, it has increased), federal habeas corpus is an appropriate vehicle to give litigants federal review in this situation.

This Court only last term held that federal habeas corpus was appropriate to challenge a search made under a statute practically identical (although slightly less vague) with the Henderson ordinance *even though the defendant had pleaded guilty in the state court proceeding. Lefkowitz v. Newsome*, __ U.S. __, 43 L. Ed.2d 200 (1975). It would have made little sense to affirm the grant of the writ in *Lefkowitz* if arrests and searches under unconstitutional statutes fell outside the ambit of 28 U.S.C. §2254.[42] The conclusion is inescapable that, even applying petitioner's suggested rule, federal habeas corpus is an appropriate vehicle to review respondent's arrest and search.

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[42] Either the scope of federal habeas corpus is not a jurisdictional question, therefore it was waived by petitioner's failure timely to raise it, or the question is jurisdictional and was resolved in favor of respondent by this Court's holding in *Lefkowitz, supra*.

**D. If the court establishes a new rule that habeas corpus is no longer available to review Fourth Amendment claims, the new rule should not apply to respondent.**

There was no doubt about the propriety of habeas corpus to review Fourth Amendment claims at the time respondent filed his petition in the Federal District Court. Consequently, respondent followed the ordinary, and possibly preferred (*See Fay v. Noia*, 372 U.S. 391 (1963)), procedure of seeking federal habeas corpus rather than applying for a writ of *certiorari*. Since the time to apply for *certiorari* has now passed, to now change the *Kaufman* rule to eliminate habeas corpus would be clearly unfair in that it would effectively deny respondent the opportunity for any federal review whatsoever.

When this Court changes a jurisdictional rule on which a litigant has relied, and the litigant, had he known of the pending change, would have had an alternative means of invoking federal jurisdiction, then the Court has the discretion to announce a purely prospective ruling. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422-423 (1964); *see* W. Schaeffer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967). In *England* this Court merely clarified a prior decision (*Government and Civic Organizing Committee v. Windsor*, 353 U.S. 364 (1964)), yet because the plaintiff had relied in good faith on a different interpretation of the case, the Court applied its new ruling purely prospectively.

> On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action. *England, supra*, 375 U.S. at 422-23.



If prospective overruling was fair in *England*, where the Court was merely clarifying a prior holding, the fairness of prospective overruling is manifest when the Court is overruling a prior decision squarely on point. Forfeiture of the right to apply for *certiorari* because petitioner relied on this Court's clear holdings that habeas corpus was appropriate would be unconscionable. Moreover, there is no countervailing reason why petitioner should be given the benefit of the new rule *in this case*. The real party in interest, the State of California, undoubtedly has and will have numerous federal habeas corpus petitions raising Fourth Amendment issues which the state must defend. Consequently, this Court may be assured that petitioner has a sufficient stake in the outcome of this issue to insure that the question will be presented in a truly adversary proceeding. It is fair to say that even with advance knowledge that the new rule would be applied purely prospectively, petitioner would brief and argue the issue with equal vigor. In addition, petitioner failed to raise the question of the propriety of habeas corpus in the District Court. (App. 58-73). Apparently even petitioner had no serious doubts about the propriety of habeas corpus until it was raised, almost as an afterthought, for the

first time in their reply brief before the Ninth Circuit. See 507 F.2d at 97 n.4.

## VIII

### IT CANNOT BE SAID BEYOND A REASONABLE DOUBT THAT EVIDENCE OF RESPONDENT'S CAPTURE IN POSSESSION OF THE MURDER WEAPON DID NOT CONTRIBUTE TO THE JURY'S VERDICT

At respondent's trial Officer Lattin was brought from Henderson, Nevada in order to testify to the arrest and search of defendant which produced the murder weapon. He also testified to respondent's attempt to change his name at the police station. The gun, itself, was introduced into evidence, and a criminalogist testified that it was the same gun that fired the fatal bullet. The United States Court of Appeals for the Ninth Circuit, after carefully reviewing the record of the trial, concluded that it could not "in good conscience" conclude beyond a reasonable doubt that this evidence did not contribute to respondent's conviction.[43] 507 F.2d at 98-99; *Chapman v. California*, 386 U.S. 18, 24 (1967).[44]

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[43]The court below did not consider the prejudicial impact of respondent's attempt to change his name at the Henderson police station. Since the Court found the evidence concerning the seizure of the gun to be prejudicial, there was no need to do so.

[44]The California District Court of Appeal and the United States District Court concluded that the evidence of respondent's possession of the murder weapon "was not required to establish any element of the crime charged." This is the wrong test. Under *Chapman v. California*, 386 U.S. 18 (1967), unconstitutionally seized evidence is harmless only if the court can say "that the State has demonstrated, beyond a reasonable doubt, that the admission of the unlawfully seized evidence did not contribute to respondent's conviction. . . ." *Id.* at 24.



On the facts of this case, the Ninth Circuit's conclusion is clearly correct. In the absence of the gun or evidence of respondent's possession of the weapon, respondent could well have been acquitted. Even if he were not completely acquitted, the illegally seized evidence undoubtedly had an impact on the jury's consideration of the seriousness of the offense, pushing the jurors towards second degree murder rather than voluntary or involuntary manslaughter. Indeed, if this were not the intended and obvious impact of the evidence, it is difficult to imagine why the prosecutor went to so much trouble, and risked reversal, to introduce it.

At the trial there was only one witness, Mr. Buckley, who testified that he was in the room when Mrs. Parsons was shot. Unfortunately, one cannot say which version of his testimony should be believed. During the first day of Mr. Buckley's testimony he stated that he did not see, or could not remember seeing, respondent with the gun. He also testified that the gun went off while all three (Mr. and Mrs. Parsons and respondent) were wrestling over it, and that Mrs. Parsons was throwing things at respondent and beating him on the head with a stamp dispenser. The prosecution attempted to impeach Mr. Buckley with a statement he had given to a police officer while he was in the hospital. The officer's statement said "the next thing he [Buckley] knew was that Lloyd [respondent] had the gun and first of all shot the manager's wife, and then the manager." The trial recessed for a holiday, and when Mr. Buckley again took the stand he changed his testimony and testified that he "believed" that respondent had the gun in his hand. The record suggests a number of reasons why Mr. Buckley changed his testimony. Mr. Buckley had originally been charged with the murder, and on cross-examination he admitted that, although the charge had

been dropped at the preliminary hearing, he knew the charge could be reinstated at any time. There was also strong evidence that Mr. Buckley was guilty of attempted larceny from the cash register. In addition, Mr. Buckley's testimony, if read in conjunction with Mr. Parsons' testimony, would place Mr. Buckley as the only person in the liquor store when Mrs. Parsons was shot. The statement given to the officer in the hospital was given while Mr. Buckley was suffering from intoxication, pain and loss of blood. He was also under arrest for attempted murder, and he testified that he gave the statement in order to show that he was not responsible (Tr. 118). Given the additional fact that Mr. Parsons testified that the shooting occurred in the opposite order (first he was shot, then he left the room and Mrs. Parsons was shot), the jury would have been justified in rejecting Mr. Buckley's testimony on these critical issues.

There is no question that Mr. Parsons, not respondent, was the first to introduce deadly force into this confrontation. In fact, Mr. Parsons testified that he fired the first shot. Although he testified that he placed the gun behind the ice-cream freezer, Messrs. Chaney, Mercer and Buckley testified that the gun first went off while respondent and Mr. Parsons were struggling over it. In the course of the struggle, Mrs. Parsons, a 380-pound woman, had launched a furious assault on respondent, throwing things at him and beating him on the back of the head with a stamp dispenser. Mr. Buckley testified that all of the shots, including the fatal one, were fired while all three were struggling over the gun.

Given this state of the record, the jury was instructed extensively on doctrines of self-defense, justifiable homicide, and the law regarding the extent to which a landowner may use force to eject a trespasser. The jury



was also given five possible verdicts: (1) first degree murder; (2) second degree murder; (3) voluntary manslaughter; (4) involuntary manslaughter; (5) not guilty. The jury convicted respondent of second degree murder. Against this background, it cannot be said beyond a reasonable doubt that the illegally seized evidence did not contribute to the fact of conviction or to the degree of the crime.

The fact that respondent was found in possession of the death weapon on the same day as the shooting is hardly trivial evidence of guilt. It shows that, at least at some time, he had exclusive control of the weapon. It would tend to corroborate Mr. Buckley's second version of what happened, and it would tend to eliminate the possibility that either Mr. Buckley or Mr. Chaney (who also fled and was arrested with respondent) was guilty of the crime. It would also tend to raise the degree of the crime, because it would be some evidence that he had exclusive possession of the weapon at the time the fatal shot was fired.

In addition, the fact that respondent was arrested while armed with this gun in a shopping center would create the impression that he might have intended to commit some further crime, and therefore, was an evil desperate man of violence. 407 F.2d at 99. When the fact is added that the gun contained six expended cartridges, while only three shots were fired in the liquor store, the impact of this evidence on the degree of the crime is obvious. Likewise, respondent's attempt to change his name at the police station only exacerbates the impact of this evidence.

While the identity of the person responsible for the shooting was a serious issue at the trial, the degree of respondent's culpability, if any, was even more hotly

contested. There was substantial evidence that the fatal shot was fired during a violent struggle over possession of the gun (*E.g.*, Tr. 70-71, 73, 80-81, 103-05, 169). On this record, the jury could have concluded that the shooting was an accident or self-defense. Likewise, the jury could have concluded that at most it was involuntary or voluntary manslaughter.

After stating several times in final argument that the only real issue was "intent" (Reporter's Partial Transcript 28, 37, 39, hereinafter R.P.T.), the prosecutor took the weapon seized from the defendant and demonstrated the force needed to pull the trigger. He invited the jury to "pull the trigger" in order that each juror might decide for himself "that it doesn't fire accidentally and it doesn't hit people accidentally either." (R.P.T. 37, 38). In determining the degree of the crime in a death by gunshot case, it is obvious that when there has been a struggle over the gun the single most important piece of evidence tending to escalate the degree of the crime can be the trigger pull on the fatal weapon.

The prosecuting attorney certainly appreciated the importance of this evidence. He brought Officer Lattin all the way from Henderson in order to introduce it. He called Mr. Davidson, a ballistics expert, in order to prove that the gun in respondent's possession was the fatal weapon. Most importantly, he risked the reversal of this case in order to introduce the weapon and Officer Lattin's testimony. A seasoned trial attorney is hardly going to risk reversal of his case in order to introduce evidence that he believes beyond a reasonable doubt will have no impact on the outcome of the trial. It hardly



behooves petitioner to now argue that this evidence could have had no impact on the jury's verdict.

## CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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